

PRINCIPLES
AND
PRECEDENTS
OF
HINDU LAW,
BEING
A COMPILATION OF PRIMARY RULES

RELATIVE TO
THE DOCTRINE OF INHERITANCE, CONTRACTS,
AND MISCELLANEOUS SUBJECTS;

AND
A SELECTION OF LEGAL OPINIONS
INVOLVING THOSE POINTS,
DELIVERED IN
THE SEVERAL COURTS OF JUDICATURE
SUBORDINATE TO THE PRESIDENCY OF FORT WILLIAM.

TOGETHER WITH
NOTES ILLUSTRATIVE AND EXPLANATORY,
AND
PRELIMINARY REMARKS.

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SO MUCH has, of late years, been written on the subject of **Hindu Law**, that any addition to the information already communicated, may at first sight be regarded as altogether superfluous. In Bengal, there has been recently published a work entitled **Considerations on Hindu Law** as current in that province ; besides which, the stock of reported Cases, involving questions connected with that law, has been very considerably augmented. In the publication called the **Elements of Hindu Law**, we find a sketch of the jurisprudence in question, Conformably to the system in force at Madras, together with an Appendix, containing the replies of the **Pundits**, (or as they have been termed by the Compiler, the *responsa prudentum*.) with reference to cases actually brought under litigation in the several civil courts subordinate to that presidency ; while the **Reports of Cases** decided in the **Sudder Adawlut** at **Bombay**, and a work published at the

same presidency under the appellation of a Summary of *Hindu Law*, have afforded valuable information regarding the laws and customs of the *Hindu* population on that side of India. There still, however, remained a desideratum, which I have here endeavoured to supply. It still remained to state the Law, and its varieties as current throughout the extensive territories subject to the Presidency of Bengal, and to furnish a collection of precedents of points already determined, which might serve as a safe, because an uninterested, guide, to the correct decision of future and similar questions.

“If books and laws,” observed Dean Swift, “continue to increase as they have done for fifty years past, I am in some concern for future ages, how any man will be learned, or any man a lawyer*.” Such a complaint could not with justice be made of publications relating to the *Hindu* law, or of that law itself, to which there have been no modern additions, and our knowledge of which may be said to be as yet in its infancy. It is not likely that works on this sub-

* *Thoughts on various Subjects.*

ject will ever attain to an overwhelming number. Few men have leisure to become acquainted with the law in an English dress, and still fewer to study it in the original. The civil functionaries of this country, from the first moment of their entry into public life, for the most part find their time and attention so completely absorbed in the discharge of their indispensable and current official duties, as to render it hopeless for them to attempt to acquire a knowledge of those laws which they are bound to administer. In such a state of things, it must be admitted, that any information which may be turned to account in practice, cannot but be eminently useful—nor does there appear to be any better method of solving judicial doubts, than by resorting to decisions already passed, the accuracy of which may generally be admitted, and the impartiality of which can never be denied.

It has been my object in this work, to fix doubtful points regarding which a contrariety of opinion has hitherto prevailed; and passages from the publications above alluded to have not unfrequently been cited in corroboration of the doctrines which I have adopted. Though I have satisfied myself, I am aware it by no means follows that

others should be convinced with the same facility : but it is certainly true, that questions of the highest importance, and which are of every-day occurrence, should be finally determined in one way or another. The mode is nothing :—the determination is every thing. It matters little, for instance, to the community at large, whether a father shall be held to have the right of conferring his ancestral real property on one son, to the exclusion of the rest ; but it is of the highest importance to every member of the community, that the rights and privileges of each should, as far as practicable, be defined and established.

I apprehend that the Hindu law, in its pure and original state, does not furnish many instances of uncertainty or confusion. The speculations of commentators have done much to unsettle it, and the venality of the Pundits has done more. It was remarked by Paley, that “ after all the certainty and rest that can be given to points of law, either by the interposition of the legislature or the authority of precedents, one principal source of disputations, and into which indeed the greater part of legal controversies may be resolved, will remain still, namely, the competition of opposite analo-

gies*.” But this source of uncertainty should not exist in the system here treated of. The Pundits are called upon, not in the character of advocates to urge different analogies, but as faithful expositors of existing written law with relation to simple facts distinctly stated. There is not any contention of the bar in such matters, and there ought not to be the exercise of any ingenuity. It may seem harsh and unjust to pass an indiscriminate censure upon any body of men: but while I admit, that there are not wanting among them individuals of unimpeachable honesty and profound erudition, I am still of opinion, that to the Pundits is chiefly attributable the perplexity of the system which it is their province to expound. The difficulty of detection is tempting; and, where the law is perverted, the perversion is seldom so glaring as to admit of exposure by superficial inquiry. Authorities are frequently cited in support of a particular doctrine, which are indeed genuine passages of law, but applicable to a question wholly different from the subject matter. Again, authorities may be cited, which are both genuine and applicable to the identical subject treated of, but which are of no weight in the particular

* Moral Philosophy, Book VI. Chap. 8.

province whose doctrine should have been adopted. Further facility for evasion is gained by the confusion between natural and civil obligations. This is the case in the Hindu law, especially as it obtains in the province of Bengal. It by no means follows, that because an act has been prohibited, it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible. That this should be the case, in a system containing so much of ethical ingredients, is not to be wondered at ; but the principle of legalizing a breach of positive prohibitions, has been carried much further than could have been contemplated by the legislator. Every man is declared to be master of his own acquisitions. This is a maxim of law : but in the distribution of it, he should not shew an undue preference to any individual member of his family. This is a precept of morality. By infringing the latter, the force of the former is not destroyed : consequently the undue preference in this case is not repugnant to law. But, on the other hand, a father and son have equal right to ancestral real property. This also is a maxim of law : and if an undue preference be shewn in the disposition of this species of property, such act is not only at variance with the moral precept,

but is repugnant to the positive law. It has nevertheless been contended, as will be more fully shewn in the body of this work, that such act, if done, must be considered as legal to all intents and purposes. This question has been discussed at some length in the present compilation : and though it is not to be expected that the conclusions I have formed in this and other instances should be considered as infallible guides, yet the grounds whereon they rest have been severally given, which may tend to shew whether they should be acquiesced in or rejected. I may however be permitted to add, that these conclusions have not been arrived at without consulting books, and having recourse to the best available living authorities.

By Section 15, Regulation IV. 1793, re-enacted for Benares and the Upper Provinces by Regulation VIII. of 1795, §. 3, and Regulation III. of 1803, §. 16, it is provided, that in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Hindu laws with regard to Hindus, are to be considered as the general rules by which the judges are to form their decisions. Questions connected with the two first-mentioned points are frequently litigated in the

established courts, while those originating in the last-mentioned sources of contention are for the most part adjusted by reference to private arbitration. These subjects have, therefore, been but slightly adverted to in the following pages, designed as the work is solely for the purpose of practical utility. The provision in the enactments above cited would appear to exclude cases of contract, evidence, and other miscellaneous matters ; but there may be questions incidentally involving these topics, and they may be so interwoven with cases which it is the duty of the courts to decide agreeably to the Hindu law, that attention to the principles of the one may be essential to the due adjudication of the other. For instance, in a claim of inheritance, the defendant may plead a title by purchase, and the question will then arise as to how far the ancestor was at liberty to contract. So also in a case of disputed marriage, it may be a question as to how far the witnesses adduced in support of its validity may be considered competent or otherwise. This will involve some consideration of the law of evidence.

Ancient laws, pronounced to be obsolete in the present age, I have purposely omitted the mention

of; such as the doctrines relative to the various descriptions of subsidiary sons, and those respecting the rights of sons by mothers of different classes, only three kinds of adoption being permitted or practised in the present age, and marriage with females of a different tribe being prohibited. The subjects discussed in this work are those of Inheritance, Partition, Marriage, Adoption, Minority, Slavery, Contracts (including Debt, Gift, and Sale), and Judicial Proceedings, being a translation of an extract from the *Vyavahāramātrica Prukurn* of the *Mitācsharā*, including the Law of Evidence and Pleading. A considerable portion of this, especially the chapter on Ordeals, might perhaps have been omitted without material detriment to the utility of the work; but I was induced to add it for the gratification of curiosity, no entire version having yet been made, to my knowledge, of this topic of *Hindu* jurisprudence. On their Law of Bailments I have not deemed it necessary to touch, as that subject has been amply discussed in the Digest translated by Mr. Colebrooke, and epitomes of the same are contained in the Considerations on the Hindu Law as current in Bengal, as well as in the work entitled “Elements of Hindu Law.”

It will be conceded, I imagine, that the rules affecting succession are clear, simple, and copious; that provision is made for almost every case that can possibly arise; and, making allowance for the different opinions which prevail in the different schools, and for a few disagreements among authors of the same school on points of minor importance, that there can be but little room for hesitation, when a question respecting inheritance is litigated, and little reason to apprehend that an erroneous conclusion may be arrived at. In all codes, however, there must be some omissions which can only be supplied by analogy. From this defect the Hindu law cannot be expected to be altogether exempt. Where such cases occur, they doubtless furnish ample food for ingenuity; though in the course of my experience, I have met with but few instances of the kind, and still fewer in which there could be any legitimate or reasonable ground to doubt as to which side of the argument the preference should be assigned. I will illustrate my meaning by mentioning a case in point, in which, though there is more to be said on both sides than in most others of a similar nature, there can be but little doubt as to the doctrine which should be preferred. A man dies childless, leaving three widows him surviving.

He gives permission to one of them to adopt a son after his death, which is done accordingly. The adopted son dies, also childless, leaving the three widows aforesaid him surviving. Now the question is, to whom, on the death of such adopted son, will the property go? Should it be taken entirely by the widow who made the adoption, or should it be divided equally among the three widows? The law is silent as to this particular case; and those who contend that the property should be taken by the single widow, do so on the ground that although, had there been no adoption, the three widows would have been entitled to equal shares, and although, had the childless husband adopted the boy during his lifetime, he could not have selected for him as adopting mother one of his three wives and excluded the others from all maternal relation, yet that a boy having been adopted after the death of the husband, the estate to which he succeeded belongs of right to the widow who received him in adoption, to the exclusion of the other two, who can be considered in the light of step-mothers only. This reason seems plausible enough, but it is not the law. The three widows of the same man are held to be, in a legal point of view, one and the same individual. The widow to

whom the permission was given may indeed have the privilege of selecting the boy to be adopted ; but the adoption being once made, he necessarily holds the same relation to all the three widows of his adopting father. I here merely allude to the rights and privileges accruing to the single widow from the simple fact of her having made the adoption, independently of any intention expressed or implied by the deceased, that such widow alone should be considered as the mother of the adopted child. If he declared this explicitly, the case would be different ; or if such may be reasonably gathered to have been his intention, from some unequivocal indication of his will that his other wives should have no concern with the adoption. But the simple fact of his having commissioned any one of the three to select the boy, cannot be considered as sufficient to deprive the two others of their maternal rights, or to debar them from taking the shares to which they would have succeeded had no adoption taken place. Another case in point is that of a man dying survived by three widows, who take his property and divide it among themselves, each taking a third. On the death of one of them, who is entitled to succeed to her property, the other widows, or the heirs male of her husband ? The

law is silent as to this point also. It is true that the law ordains the succession of the husband's heirs after the widow ; but this rule does not contemplate the existence of other widows, and the weight of it is counterbalanced by another, which prescribes that the widow shall take the entire property, to the exclusion of the heirs of the husband ; and, consequently, on the death of the first widow, the second and third take the share of which she died possessed, and, on the death of the second, the entire property will devolve on the third ; nor have the husband's heirs any legal claim until after her death. This proceeds upon the principle above mentioned, that all the three widows of the same man are held to be, in a legal point of view, one and the same individual. Cases of this description might here be infinitely multiplied, but the foregoing will suffice for the present.

The Hindu law of partition contains one anomaly, which would at first sight appear unjust and absurd. I allude to that rule which entitles an idle brother to claim a share of the acquisitions of his industrious brethren,—the drone to participate in the labours of the hive. But when the peculiar constitution of the Hindu society is considered,

this provision will not be found to be altogether repugnant to justice or to reason. No respectable Hindu would travel in quest of employment without providing sufficient protection for the females of his family ; and the individual usually selected for this purpose is one of the brethren, who resides without any active employment in the family house, while the rest go in quest of service, and not unfrequently amass immense wealth, while the brother left behind has not advanced one step from his original state of poverty. But it would be hard to deny him a share of the good fortune which had attended his brethren, since it is evident, that unless some one had performed the part he undertook, they could not have acquired the wealth ; and he may, therefore, be fairly held to have contributed his aid towards the acquisition. It might also be affirmed, that had he engaged in a more active occupation, the same success would also have attended his endeavours. Where the patrimony has been used (however slight the use of it may have been) in making the acquisition, an idle brother, though not engaged in domestic duties, is entitled to participate likewise ; but even in this provision there is reason. It could not be affirmed with certainty, that the same sum extracted

from the original stock might not have been turned to so good an account by him who had not, as by him who had expended it. The sum so expended was the root and origin of the subsequent acquisition ; and, as to its amount, it would obviously be impracticable to define what should, and what should not be considered to constitute the use of the patrimony.

Questions connected with the connubial state are, as I before observed, but rarely brought into the courts of judicature under this presidency. I have, therefore, refrained from expatiating on the subject. It can but rarely, if at all, in any of its bearings, form a topic of legal controversy. To those who are desirous of more full and particular information relative to this branch of Hindu economy, the labours of Ward may safely be recommended, as combining minuteness with accuracy in an eminent degree.

The law regarding adoption is deserving of the most serious and attentive consideration, as there is perhaps no topic of Hindu jurisprudence more surrounded by doubts and difficulties. Some of these I have endeavoured to clear up and remove ; and if I

have betrayed too much confidence in the attempt, I can only plead in excuse, that to speak dubiously where I had brought my own mind to conviction, would have defeated the object I had in view. Reduction to certainty, or to a point as nearly approaching to it as practicable in the absence of positive demonstration, was that object ; but it will be for others to judge, having the evidence and the conclusion before them, whether the latter is consistent with the former. In all essential matters, it will be seen that the law of adoption among the Hindus assimilates closely to that which prevailed among the Athenians and the Romans. The points regarding which, in modern practice, the greatest disagreement has been evinced, are those relative to the proper age for adoption, the succession of the son adopted to the property of his adopting father's collateral relations, and the legality or otherwise of two successive adoptions.

In the case of minors, the Hindu legislature does not appear to have made any express provision against the rapacity of those interested in outliving them ; but it was probably considered, that by constituting the sovereign power the legal guardian of all infants, and by declaring them exempt from lia-

bility of whatever description, *durante minoritate*, sufficient safeguards had been established ; that by the first would have been secured wisdom and caution in the selection of an immediate protector for the person and property of the minor ; and that by the second all pretence for the invasion of his interests would be removed.

I have not thought it requisite to discuss at much length the doctrine of slavery among the Hindus : but since hazarding a few observations on that topic, I have looked into Puffendorf's Disquisition on despotical Power*, and find that he traces the origin of all servitude to contract. He observes, that " in the early ages of the world, when men began to quit their primitive plainness and simplicity, to cultivate the method of living, and to enlarge their fortunes and possessions, it is very likely the wiser and richer sort invited those of less parts and less wealth, to assist them in their business for hire. Afterwards, when both parties found their benefit in this way of proceeding, the meaner tribes were by degrees persuaded to join themselves perpetual members to the families of the greater," &c. He

* Book vi. Ch. 3.

then proceeds to argue, that “the convenience of discharging inferior offices and labours by the hands of others being thus found out, in succeeding times, when wars grew pregnant in the world, it passed by degrees into a custom, to indulge captives with life and corporal liberty, upon condition that they should yield perpetual service to the conqueror.” In this respect the learned jurist (as he himself admits) differs from many other high authorities; but it matters little whether slavery had its origin in war or in peace. We know, at all events, that in proportion to the progress of the arts of peace, the evils of war are mitigated, and that it is only among the most uncivilized nations of the present day that success in war is considered as a just reason for making slaves of the captives.

Contracts are not required by the Regulations to be interpreted conformably to the principles of Hindu law, though it must occasionally so happen that a reference to this branch of jurisprudence will be found necessary for the adjustment of a dispute connected with the law of inheritance. In the chapter on minority, allusion is made to a case illustrative of this fact. In the case adverted to, the mother of a minor had sold his paternal landed property, with

a view to liquidate a debt which had been contracted by his father. On suit to set aside the sale, and to recover the estate in virtue of the right of inheritance, it became necessary to determine, in the first instance, how far the widow was competent to contract, under all the circumstances of the transaction; and the determination of this question obviously depended on the law by which the transferred estate was governed. The necessity of conforming to the Hindu law of contracts, had it been enjoined as the rule of decision in all their dealings, would not, perhaps, have furnished just cause of regret. The Supreme Court is required to administer justice to the Hindus in matters of contract agreeably to their laws and usages; and it has been remarked by one of the Judges of that Court*, who had devoted no small portion of his time to the study of their code, and who was not by any means disposed to view it generally in a favourable light, that “if a prevalence of common sense is to be discovered in the laws of the Hindus, it must be sought for in that portion of them, containing the precepts by which dealings between one man and another are to be regulated.”

* The author of the *Considerations on Hindu Law as current in Bengal*.

Of the version from the *Mitácshará* containing the Hindu doctrine relative to judicial proceedings, it remains to speak. Detached portions of this translation have already appeared in the work entitled, "Considerations on Hindu Law," but I deemed it advisable to present the whole to the European reader in a connected form on this occasion. It will readily be perceived, that the forms of administering civil justice were primitive, and compendious enough. Perspicuity and precision are continually enjoined in the pleadings, and litigation appears to have been attended with no expense. We have no means of ascertaining whether the operation of the system was efficient, but it probably sufficed for a population to whom the distinctions and refinements of commerce were unknown, and who appear to have never advanced beyond a certain point of civilization. There must always be a close analogy between the state of a society and its laws. Where the one is neither artificial nor progressive, the other, as a natural consequence, will be simple and stationary. This is accordingly the case with the Hindus. For ages their national condition has undergone no change, and for ages their national code has continued undisturbed by reform or modification. The trial by ordeal, termed the *Divia Pru-*

manum, which may be translated *Judicium Dei*, forms a very prominent part of the system ; but in this the Hindus are by no means peculiar, the purification by ordeal seeming, as remarked by Blackstone, to have been very ancient and very universal in the times of superstitious barbarity. Throughout the whole of the chapter on judicial proceedings, it would not be difficult to trace analogies between the Hindu, and more enlightened codes of jurisprudence ; but I do not possess sufficient qualifications for the task, nor would the result be profitable, even were it well executed. I have, therefore, contented myself with noting such as obviously suggested themselves to me while engaged in the version of the original.

There may be said to exist in the present day five distinct schools of Hindu law, which differ more or less from each other. They may be termed the schools of Bengal, of Benares, of Mithilá, of the Dekhan, and of the Mahrattas. The original *Smritis* are of course common to all, but they each assign the preference to particular commentators and scholiasts. In Bengal, the works chiefly followed are the *Dáyabhága* of *Jimutaváhana*, the *Dáyatatwa* by *Raghunandana*, the *Vya-*

vaháratatwa by the same author, the *Subodhini*, a commentary on the *Dáyabhága* by *Sricrishna Tarcálancára*, the commentary on the same by *Achárjia Chintámani*, the *Dáyacramasangraha* of *Sricrishna*, and the compilations termed the *Vyavasthárnava*, the *Vivádárnavasetu*, and the *Viváda-bhangárnava*. In Benares, the preference is shewn to the *Mitácshará* of *Vijnyáneswara*, and its commentary by *Veereshwara Bhatta* and *Bálabhatta*; the *Veeramitrodaya* by *Mitramisra*; the *Parasurámádhava*, and the *Vyavaháramádhava*. In Mithilá, respect is paid chiefly to the following authorities:—the *Vivádachintámani* and *Vyavaharachintámani* by *Vachaspatimisra*, the *Vivádurnácara* by *Chandeswara*, the *Madanapárijata* by *Madanopadhyáya*, the *Dwaitaparisishta* by *Kesha-ba Misra*, the *Smritisára* and *Smritisamoochaya* by *Hurináthopadhyáya*, and the *Vivádachandra* by *Misroo Misra*. The *Mitácshará*, the *Smritichandricá*, the *Mádhaveeya*, and the *Suraswativilása* are the works of paramount authority in the territories dependant on the government of Madras*; while the authorities chiefly referred to on the Bombay side are, (besides the text books of *Menu* and *Yájnyawal-*

* See preface to Elem. Hin. Law, p. 14.

cya,) the *Vyavaháramayú'ha*, the *Nirnayasindhoo*, the *Hemadree*, the *Vyavahárákoustoobha*, and the *Parasurámádhava*†. I do not mean to affirm that these are the only works of paramount importance recognized in the respective schools; but they are most frequently referred to; they are sufficient to solve the ordinary legal questions which arise; and suspicion may justly be excited, where an exposition of law is supported by citations from more recondite authorities. In questions relative to the law of adoption, the *Dattacamimánsa* and *Dattacachandricá* are equally respected all over India; and where they differ, the doctrine of the latter is adhered to in Bengal and by the southern jurists, while the former is held to be the infallible guide in the provinces of Mithilá and Benares.

The Precedents contained in the second volume have been selected from an enormous mass of crude materials. When it is mentioned, that I have examined every opinion that has been delivered in every court of judicature subordinate to the presidency of Bengal from the year 1811 up to the present day, it may be a matter of wonder, that the selec-

† See preface to Summary of Hindu Law, p. 5.

tions are not more numerous and more valuable. But the task of rejection has been found very laborious ; at least nine-tenths of the opinions were ascertained, on examination, to be erroneous, doubtful, unsupported by proof, or otherwise unfit for publication ; while, in not a few instances, the nature of the case itself was involved in obscurity, from the circumstance of the reply alone being forth-coming ; the whole record of the case having been made over to the law officer, with a view to enable him to find out, and report the law upon, the point or points at issue between the parties. The admitted opinions have been carefully examined ; and they will, it is hoped, be in general found to have at least the merit of accuracy.

PRINCIPLES

OF

HINDU LAW.



CHAPTER I.

Of Proprietary Right.

PROPERTY, according to the Hindu law, is of four descriptions, real, personal, ancestral, and acquired. I use the terms real and personal in preference to the terms moveable and immoveable, because, although the latter words would furnish a more strict translation of the expressions in the original, yet the Hindu law classes amongst things immoveable, property which is of an opposite nature, such as slaves and corrodies, or assignments on land*. In a work of this kind, intended solely for the purpose of practical utility, it would be useless to attempt any inquiry as to the origin of the right of property according to the notions of the Hindus, or as to the nature of the tenures of real property in India. The various modes of acquisition, as occupancy, birth, gift, purchase, and the like, have been detailed and commented on with all the elaborate minuteness peculiar to the Hindu jurists†. It

Property is
fourfold.

* *Jim. Va.* cited in *Dig.* vol. iii. page 34.

† Is property included in the seven categories, substance and the rest, or is it distinct therefrom? *Jagannātha* in the *Digest*, vol. ii. page 506: and ownership, in his opinion, following the *Nyāya* doctrine, "is a relation between cause and effect, attached to the owner who is predicated, of particular substances, and subsisting in the substance by connexion with the predicable."

Right of by
inheritance
how created.

seems sufficient here to inquire into the nature of that property which is created by birth, for to this source must be traced all the impediments which exist to alienation; a man without heirs having an absolute and uncontrolled dominion over his property, by whatever means acquired. That an indefeasible, inchoate right is created by birth, seems to be universally admitted, though much argumentative discussion has been used to establish that this alone is not sufficient to create proprietary right. The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise,) conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle*; that is, by the death of the owner (natural or civil), or his voluntary abandonment†. In ancestral real property, the right is always limited; and the sons, grandsons, and great-grandsons of the occupant, supposing them to be free from those defects, mental or corporeal, which are held to defeat the right of inheritance‡, are declared to possess an interest in such property equal to

* *Sricrishna*, cited in the *Digest*, vol. ii. page 517.

† The fact of the ancestor being missing for a period exceeding twelve years, constitutes a legal title to succession on the part of the heirs. This doctrine was recognized in a case decided by the *Sudder Dewanny Adawlut*, on the 25th of April 1820: *Reports*, vol. iii. page 28, wherein it was determined, that twelve years should be allowed for the reappearance of a missing person, after which his death will be presumed: but some authorities maintain, that the period varies with reference to the age of the missing person. See note to Case 7. vol. ii. p. 9.

‡ Various diseases and various offences have been declared by the *Hindu* legislators to be of such a nature as to disqualify for inheritance. It is problematical how far our courts would go in support of

that of the occupant himself; so much so, that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another*. With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility†. The property of the father being thus restricted in respect of ancestral real property, and wills and testaments being wholly unknown to the Hindu law, it follows, for the sake of consistency, that they must be wholly inoperative, and that their provisions must be set aside, where they are at variance with the law; otherwise, a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his lifetime‡. A will is nothing more or less than “the legal declaration of a man’s intentions, which he wills to be performed after his

Restrictions
on alienation.

Of wills.

objections which must in some instances be deemed irrational prejudices. The only reported case in which the question has been agitated, may be found in the Bengal Reports, pages 108 and 257, vol. ii.; and in the Bombay Reports, page 411, vol. i. there is a case reported, in which a widow’s claim to her husband’s estate was disallowed on account of her blindness. For an enumeration of the disqualifying causes, see Digest of Hindu Law, page 298, vol. iii. and Elem. Hin. Law, App. page 335 et seq. and the chap. vol. ii. treating of Exclusion from Inheritance, to the note in which an enumeration of the several disqualifying circumstances has been given.

* *Jagannátha* in Dig. vol. iii. page 45.

† *Vrihaspati*, Dig. vol. ii. page 32.

‡ For a more full discussion of the right of a Hindu to make a will, see *Considerations on Hindu Law*, p. 320, wherein the opinion of Mr.

death:" but willing to do that which the law has prohibited, cannot be held to be a *legal* declaration of a man's intentions. There may be a gift in contemplation of death, but a will, in the sense in which it is understood in the English law, is wholly unknown to the Hindu system; and such gift can only be held valid under the same circumstances as those under which an ordinary gift would be considered valid. What may not be done *inter vivos*, may not be done by will. Of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law, which, however, if carried into effect, cannot, according to the law of Bengal, be set aside, and which, though immoral, and (in one sense of the word) illegal, cannot be held to be invalid. For instance, a father, though declared to have absolute power over property acquired by himself, is prohibited from making an unequal distribution of such property among his sons, by preferring one or excluding another without sufficient cause. This has been declared in the *Dáyabhāga* to be a precept, not a positive law; and it is therein laid down, that a gift or transfer under such circumstances is not null; "for a fact cannot be altered by a hundred texts." There is nothing inconsistent in this, as the doctrine is rather confirmatory of the texts which de-

Doctrine of
"factum valet"
noticed.

Colebrooke is introduced, to which the doctrine here laid down is conformable. See also the case of Huree Bullubh Gungaram, v. Keshoram Sheodas, Bombay Reports, vol. ii. page 6, in which the plea of a will in opposition to the claims of heirs was treated as inadmissible, and repugnant to the Hindu law, and the case of Sobharam Sumbhoodas, v. Purmanund Bhaeechund, *ibid.* page 471; also the case of Musst. Goolaub, v. Musst. Phool, vol. i. page 154; and that of Gungaram Viswunath, v. Tappee Bae, *ibid.* page 372. and of Tooljaram Hurjeevun, v. Hurbheram and another, *ibid.* 380; also App. Elem. Hin. Law, p. 9 *et passim*, and p. 405 *et seq.*

clare the absolute nature of the father's power over such property; but it has been held to extend to the legalizing of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to a positive law, which declares the ownership of the father and the son to be equal with respect to this description of property. But it cannot legitimately bear such a construction. It cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or, in other words, to signify that an act may be legally right, though morally objectionable. Thus a coparcener is prohibited from disposing of his own share of joint ancestral property; and such an act, where the doctrine of the *Mitácshará* prevails, (which does not recognize any several right until after partition, or the principle of *factum valet*,) would undoubtedly be both illegal and invalid. But according to the *Dáyabhága*, which recognizes this principle, and also a several though unascertained right in each coparcener, even before partition, a sale or other transfer under such circumstances would be valid and binding, as far as concerned the share of the transferring party. In the case of Bhowaneepershad Goh, *versus* Musst. Taramunee, it was determined by the Sudder Dewanny Adawlut, that according to the Hindu law as current in Bengal, a coparcener may dispose of, by gift or otherwise, his own undivided share of the ancestral landed property, notwithstanding he may have a daughter and a daughter's son living*; while in the case of Nundram and others, it was determined that, ac-

To what
cases applica-
ble.

* Sudder Dewanny Adawlut Reports, vol. iii. page 138. The same doctrine was held in the case of Ramkunhai Rai and others, v. Bungchund Bunhoojea, *ibid.* 17, and the subject is more fully discussed by Mr. Colebrooke, in a note to vol. i. pp. 47 and 117.

Cases cited
involving the
doctrine of
wills and un-
equal distribu-
tions.

cording to the law as current in Behar, a gift of joint undivided property, whether real or personal, is not valid, even to the extent of the donor's own share*. I am aware that cases have been decided in opposition to the doctrine for which I here contend. These I propose briefly to notice. The first on record is that of Rushiklal Dutt and Hurnau Dutt, executors of the will of Mudunmohun Dutt, *versus* Cheytunchurn Dutt, cited by Sir Thomas Strange, in his *Elements of Hindu Law*†. He states, that the case was decided about the year 1789; that the testator, a Hindu the father of four sons, and possessed of property of both descriptions, ancestral and self-acquired, having provided for his eldest by appointment, and advanced to the three younger ones in his life the means of their establishment, thought proper to leave the whole of what he possessed to the two younger ones, to the disinheritance of the two elder, of whom the second disputed the will: that on reference to the pundits of the court, they affirmed the validity of the will, their answers being short; and that Sir W. Jones and Sir Robert Chambers concurred in this determination. The author of the *Elements* adds: "The ground with the Pundits probably was (the Bengal maxim), that, however inconsistent the act with the ordinary rules of inheritance and the legal pretensions of the parties, *being done*, its validity was unquestionable." To this it can only be answered, that the motives which actuated the pundits in their exposition of the law, and the judges in their decision, are avowedly stated on conjecture only; and that if such motives are allowed to operate, there must be an end to all law, the maxim of *factum valet* superseding every doctrine

* Case of Nundram and others, *v.* Kashee Pande and others, *Sudder Dewanny Adawlut Reports*, vol. iii. page 232. The same doctrine was held in the case of Ooman Dutt, *v.* Kunhia Singh, *ibid.* 144.

† Page 262.

and legalizing every act. The particulars of the case not having been stated, it cannot with safety be relied on as a precedent.

The second case is that of Eshanchund Rai, *versus* Es-horchund Rai, decided in the Sudder Dewanny Adawlut on the 23d of February 1792*. In that case it was held, that a gift, in the nature of a will, made by the *zemindar* of Nuddea, settling the whole of his *zemindaree* on the eldest of his four sons, subject to a pecuniary provision for the younger ones, was good. The Pundits are stated to have assigned six reasons for this opinion, not one of which, except the last, appears entitled to any weight. The last reason assigned, namely, that a principality may lawfully and properly be given to an eldest son, is doubtless correct, and taking a *zemindaree* in the light of a principality, is applicable, and would alone have sufficed to legalize the transaction. A principality has indeed been enumerated among things impartible. But with respect to the other reasons assigned, they may be briefly replied to as follows. To the first, that, "According to law, a present made by a father to his son, through affection, shall not be shared by the brethren," it may be objected, that this relates to property other than ancestral, over which the father is expressly declared to have control. To the second, "That what has been acquired by any of the enumerated lawful means, among which inheritance is one, is a fit subject of gift," that this supposes an acquisition in which no other person is entitled to participate, and not the case of an ancestral estate, in which the right of the father and son has been declared equal. To the third, "That a coheir may dispose of his own share of undivided property," that his right

* Sudder Dewanny Adawlut Reports, vol. i. page 2.

to do so is admitted; but this does not include his right to alienate the shares of others. To the fourth, "That although a father be forbidden to give away lands, yet if he nevertheless do so, he merely sins, and the gift holds good," that the precept extends only to property over which the father has absolute authority, and cannot affect the law, which expressly declares him to have no greater interest than his son in the ancestral estate. And to the fifth, "That *Raghnandana* in the *Dáyatatwa*, restricting a father from giving lands to one of his sons, but clothes and ornaments only, is at variance with *Jimutavahana*, whose doctrine he espouses, and who only says that a father acts blameably in so doing," that no such variance in reality exists. In addition to the above, it may be stated, that the suit in question was brought by an uncle against his nephew, to recover a portion of an estate which had previously devolved entire on the brother of the claimant, and which, it appeared, had never been divided*.

The third case is that of Ramkoomar Neace Bachesputee, *versus* Kishenkinker Turk Bhoosun, decided by the Sudder Dewanny Adawlut on the 24th of November 1812†. In that case it was maintained, that the gift by a father of the whole ancestral estate to one son, to the prejudice of the rest, or even to a stranger, is a valid act, (although an immoral one,) according to the doctrine received in Bengal. To refute the opinion declared by the pundits on that occasion, it is merely necessary to state the authorities quoted by them, which would have been more applicable to the maintenance of the opposite doctrine. The following were the authorities

* See Appendix Elem. Hin. Law, page 437.

† Sudder Dewanny Adawlut Reports, vol. ii. page 42.

Of Proprietary Right.

cited in support of the above opinion. 1st. The text of *Vishnu* cited in the *Dáyabhága* : “ When a father separates his sons from himself, his will regulates the division of his own acquired wealth.” 2d. A quotation also from the *Dáyabhága* : “ The father has ownership in gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions ; and has power to distribute them unequally ; as *Yájnyawalcya* intimates : ‘ The father is master of the gems, pearls, and corals, and of all (other moveable property) ; but neither the father nor the grandfather is so, of the whole immoveable estate.’ Since the grandfather is here mentioned, the text must relate to his effects. By again saying, “ all” after specifying ‘ gems, pearls,’ &c. it is shown, that the father has authority to make a gift or any similar disposition of all effects, other than land, &c. but not of immoveables, a corrody, and chattels, (i. e. slaves ;) since here also it is said ‘ the whole,’ this prohibition forbids the gift or other alienation of the whole, because (immoveable and similar possessions are) means of supporting the family. For the maintenance of the family is an indispensable obligation, as *Menu* positively declares : ‘ The support of persons who should be maintained, is the approved means of attaining heaven : but hell is the man’s portion, if they suffer.’ Therefore (let a master of a family) carefully maintain them. The prohibition is not against a donation or other transfer of a small part, not incompatible with the support of the family : for the insertion of the word ‘ whole’ would be unmeaning, (if the gift of even a small part were forbidden.) The text of *Yájnyawalcya* cited in the *Prayushchitta-vivek* : “ From the non-performance of acts which are enjoined, from the commission of acts which are declared to be criminal, and from not exercising a control over the passions, a man incurs pu-

nishment in the next world." An examination of the authorities above quoted, as given by the law officers in the case in question, will make it evident that they are totally insufficient for the support of the doctrine to which they were intended to apply.

The fourth case is that of Sham Singh, *versus* Must. Umraotee, decided in the Sudder Dewanny Adawlut on the 28th of July 1813*, on which occasion it was determined, that, by the Hindu law as current in Mithilá, a father cannot give away the whole ancestral property to one son to the exclusion of his other sons. The author of the Considerations on Hindu Law, commenting on this decision, infers that the Sudder Dewanny Adawlut would not have entertained any doubt as to the validity of the gift, had it depended upon the law as current in Bengal; but there seems to be no other ground for this inference than the erroneous doctrines laid down in the two previously cited cases, together with the fact of the parties having disputed as to which law should govern the decision.

The fifth case is that of Bhowannychurn Bunhoojea, *versus* the Heirs of Ramkaunt Bunhoojea, which was decided in the Sudder Dewanny Adawlut on the 27th of December 1816†, and in which case it was ruled, that an unequal distribution made by a father among his sons of ancestral immoveable property is illegal and invalid, as is also the unequal distribution of property acquired by the father, and of moveable ancestral property, if made under the influence of a motive which is held in law to deprive a person of the power to

* Sudder Dewanny Adawlut Reports, vol. ii. page 74.

† Ibid. page 202.

make a distribution. The question as to the father's power was thoroughly investigated on this occasion. There being a difference of opinion between the Pundits attached to the Sudder Dewanny Adawlut, the following question was proposed to the Pundits of the Supreme Court, Tarapershad and Mrityoonjyee, to Nurahurree, Pundit of the Calcutta provincial court, and Ramajya, a Pundit attached to the College of Fort William: "A person whose elder son is alive, makes a gift to his younger, of all his property, moveable and immoveable, ancestral and acquired. Is such a gift valid, according to the law authorities current in Bengal, or not? and if it be invalid, is it to be set aside?"

The following answer, under the signatures of the four Pundits above mentioned, was received to this reference:—
"If a father, whose elder son is alive, make a gift to his younger, of all his acquired property, moveable and immoveable, and of all the ancestral moveable property, the gift is valid, but the donor acts sinfully. If during the lifetime of an elder son, he make a gift to his younger, of all the ancestral immoveable property, such gift is not valid. Hence, if it have been made, it must be set aside. The learned have agreed that it must be set aside, because such a gift is *a fortiori* invalid; in as much as he (a father) cannot even make an unequal distribution among his sons of ancestral immoveable property; as he is not master of all; as he is required by law, even against his own will, to make a distribution among his sons of ancestral property not acquired by himself (i. e. not recovered); as he is incompetent to distribute such property among his sons until the mother's courses have ceased, lest a son subsequently born should be deprived of his share; and as, while he has children living, he has no authority over the ancestral property.

“ Authorities in support of the above opinions.

1st. *Vishnu*, cited in the *Dáyabhága* :—“ His will regulates the division of his own acquired wealth.” 2d. *Yágy-nywalcya*, cited in the *Dáyabhága* :—“ The father is master of the gems, pearls, corals, and of all other moveable property.” 3d. *Dáyabhága* :—“ The father has ownership in gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions.” 4th. *Dáyabhága* :—“ But not so, if it were immoveable property inherited from the grandfather, because they have an equal right to it. The father has not in such case an unlimited discretion.” Unlimited discretion is interpreted by *Sricrishna Tarcalancára* to signify a competency of disposal at pleasure. 5th. *Dáyabhága* :—“ Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather’s estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth.” Commentary of *Sricrishna* on the above texts :—“ Although the father be in truth lord of all the wealth inherited from ancestors, still the right here meant is not merely ownership, but competency for disposing of the wealth at pleasure ; and the father has not such full dominion over property ancestral.” 6th. *Dáyabhága* :—“ If the father recover paternal wealth seized by strangers, and not recovered by other sharers, nor by his own father, he shall not, unless willing, share it with his sons ; for in fact it was acquired by him.” In this passage, *Menu* and *Vishnu* declaring that “ he shall not, unless willing, share it, because it was acquired by himself,” seem thereby to intimate a partition amongst sons, even against the father’s will, in the case of hereditary wealth not acquired (that is, recovered) by him. 7th. *Dáyabhága* :—“ When the mother

is past childbearing," regards wealth inherited from the paternal grandfather. Since other children cannot be borne by her when her courses have ceased, partition among sons may then take place; still, however, by the choice of the father. But if the hereditary estate were divided while she continued to be capable of bearing children, those born subsequently would be deprived of subsistence: neither would that be right; for a text expresses: "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured." *Sri-crishna* has interpreted "the dissipation of hereditary maintenance" to signify, the being deprived of a share in the ancestral wealth. *Dwaitanirnaya*:—"If there be offspring, the parents have no authority over the ancestral wealth; and from the declaration of their having no authority, any unauthorized act committed by them is invalid." Text of *Vijnyaneshwara*, cited in the *Medhatithi*:—"Let the judge declare void a sale without ownership, and a gift or pledge unauthorized by the owner." The term "without ownership," intends incompetency of disposal at pleasure. Text of *Nāreda*:—"That act which is done by an infant, or by any person not possessing authority, must be considered as not done. The learned in the law have so declared."

I have given the above opinion, together with the authorities cited in its support, at full length, from its being apparently the most satisfactory doctrine hitherto recorded on the subject. By declaring void any illegal alienation of the ancestral real property, it preserves the law from the imputation of being a dead letter, and protects the son from being deprived by the caprice of the father, of that in which the law has repeatedly and expressly declared them both to

have equal ownership. The case of Ramkaunt is the latest reported decision by the Sudder Dewanny Adawlut connected with the point in question. Various cases have been cited by the author of the "Considerations*," in which wills made by Hindus have been upheld by the Supreme Court, though at variance with the doctrine above laid down. The will of rajah Nobkishen, who, although he had a begotten and an adopted son, left an ancestral *talook* to the sons of his brother, is perhaps the most remarkable of the cases cited; but in this, as well as in most of the others, the point of law was never touched upon, the parties having joined issue on questions of fact. Upon the whole, I conclude that the text of the *Dáyabhāga*, which is the groundwork of all the doubts and perplexity that have been raised on this question, can merely be held to confer a legal power of alienating property, where such power is not expressly taken away by some other text. Thus in Bengal, a man may make an unequal distribution among his sons of his personally acquired property, or of the ancestral moveable property; because, though it has been enjoined† to a father not to distinguish one son at a partition made in his lifetime, nor on any account to exclude one from participation without sufficient cause, yet, as it has been declared in another place that the father is master of all moveable property, and of his own acquisitions‡, the maxim that a fact cannot be altered by an hundred texts here applies to legalize a disregard of the injunction, there being texts declaratory of unlimited discretion, of equal authority with those which condemn the practice. In other parts of India, where the

Ancestral
real property
cannot be alienated
at pleasure.

* See the chapter on Wills, page 316 *et passim*.

† *Catýáyana*, cited in Dig. vol. ii. page 540.

‡ *Yājñawalkya*, Ibid. page 159.

maxim in question does not obtain, the injunction applies in its full force, and any prohibited alienation would be considered illegal*. The subject will be resumed in the chapter treating of Partition.

* Elements of Hindu Law, vol. i. page 123, and Appendix, Chap.1st ; and see Bombay Reports, pages 154, 372, and 380, vol. i. and pages 6 and 471, vol. ii.

CHAPTER II.

OF INHERITANCE.



According to the Hindu law of inheritance, as it at present exists, all legitimate sons, living in a state of union with their father at the time of his death, succeed equally to his property, real and personal, ancestral and acquired. In former times, the right of primogeniture prevailed to a certain extent; but that, with other usages, has been abrogated in the present or *Cālī* age*. The right of representation is

Of sons.

* See the case of Taliwur Singh, *versus* Publwan Singh, Sudder Dewanny Adawlut Reports, vol. iii. page 203, wherein a claim of primogeniture being preferred, it was determined that priority of birth does not entitle to a larger portion. There is another decision on record (vol. ii. page 116.) of a case in which there were sons by different wives, and one party claimed that the estate should be distributed according to the number of wives, without reference to the number of sons borne by each, (a distribution technically termed *Putnibhaya*,) averring that such had been the *Koolachar*, or immemorial usage of the family; but the Court determined that the distribution among them should be made, not with reference to the mothers, but with reference to the number of sons: being of opinion, that although, in cases of inheritance, *Koolachar*, or family usage, has the prescriptive force of law; yet, to establish *Koolachar*, it is necessary that the usage have been ancient and invariable. See also the case of Bhyroochund Rai, *versus* Russoomunee, vol. i. page 27, and the case of Sheo Buksh Sing, *versus* the Heirs of Fut-

also admitted, as far as the great-grandson; and the grandson and great-grandson, the father of the one and the father and grandfather of the other being dead, will take equal shares with their uncle and grand-uncle respectively. Indeed the term *putra*, or son, has been held to signify, in its strict acceptation, a grandson and great-grandson. An adopted son is a substitute for a son of the body, where none such exists, and is entitled to the same rights and privileges. Among the sons of the *Sudra* tribe, an illegitimate son by a slave girl takes with his legitimate brothers a half share; and where there are no sons (including sons' sons and grandsons), but only the son of a daughter, he is considered as a coheir, and takes an equal share*.

Of sons' sons.

In default of sons, the grandsons inherit, in which case they take *per stirpes*, the sons, however numerous, of one son, taking no more than the sons, however few, of another son.

Of sons' grandsons.

In default of sons and grandsons, the great-grandsons inherit; in which case they also take *per stirpes*, the sons, however numerous, of one grandson, taking no more than the sons, however few, of another grandson. They will take the shares to which their respective fathers would have been entitled, had they survived.

teh Sing, vol. ii. page 265. See also *Elem. Hin. Law*, App. page 288. In the succession to principalities and large landed possessions, long established *Koolachar* will have the effect of law, and convey the property to one son to the exclusion of the rest. It has been stated by Mr. Colebrooke, in a note to the *Digest*, (vol. ii. page 119,) that the great possessions called *zemindarees* in official language, are considered by modern Hindu lawyers as tributary principalities.

* *Mitac.* Chap. I. Sect. xii. §§ 1 and 2.

In default of sons, grandsons, and great-grandsons in the male line, the inheritance descends lineally no farther, and the widow inherits, according to the law as current in Bengal, whether her late husband was separated, or was living as a member of an undivided family; but according to other schools, the widow succeeds to the inheritance in the former case only; an undivided brother being held to be the next heir. If there be more than one widow, their rights are equal*. Much discussion has arisen respecting the nature of the tenure by which a widow holds property that had devolved upon her by the death of her husband; and certainly the law, in this instance, as in many others, admits of great latitude of interpretation. It is well known, that between the Bengal and the other schools, there is a difference of opinion as to the circumstances under which a widow has a right to succeed to the property of her deceased husband. By the law as current in Bengal, as has been already observed, she is entitled to succeed, whether the husband was living in a state of union with, or separation from, his brethren. By that of other schools, only where the husband was separated from his brethren. So far, as to the right of succession, the law is clear and indisputable, but to what she succeeds is not so apparent. She has not an absolute proprietary right, neither can she, in strictness, be called even a tenant for life: for the law provides her successors, and restricts her use of the property to very narrow limits. She cannot dispose of the smallest part, except for necessary purposes, and certain other objects particularly specified. It follows, then, that she can be considered in no other light than as a holder in trust for certain uses; so much so, that should she make waste, they who have the reversionary interest have clearly

Of the widow.

* See Elem. Hin. Law, App. page 59.

a right to restrain her from so doing. What constitutes waste, however, must be determined by the circumstances of each individual case. The law has not defined the limits of her discretion with sufficient accuracy, and it was probably never in the contemplation of the legislator that the widow should live apart from, and out of the personal control of her husband's relations, or possess the ability to expend more than they might deem right and proper. In assigning a motive for the ordinance that a widow should succeed to her husband, and at the same time that she should be deprived of the advantages enjoyed by a tenant for life even, it seems most consistent with probability that it originated in a desire to secure, against all contingencies, a provision for the helpless widow, and thereby prevent her from having recourse to practices by which the fame and honour of the family might be tarnished. By giving her a nominal property, she acquires consideration and respectability, and by making her the depositary of the wealth, she is guarded against the neglect or cruelty of her husband's relations. At the same time, by limiting her power, a barrier is raised against the effects of female improvidence and worldly inexperience. This opinion receives corroboration from the distinction which prevails in the Benares school, which may be said to be the fountain and source of all Hindu law. By the provisions of that code, where the brothers are united with the deceased husband, and where consequently it is fair to presume a spirit of friendship and cordiality, and there is no reason to anticipate that the widow will be treated with neglect by the brothers, she is declared to have no right of succession. It is only where the family is divided, and where there might consequently be reason to apprehend a want of brotherly feeling, that the law deems it necessary to interpose, and protect her interests. And it may be here observed, that if a man die leaving more than one widow, (three

widows, for instance,) the property is considered as vesting in only one individual: thus, on the death of one or two of the widows, the survivor or survivors take the property, and no part vests in the other heirs of the husband until after the death of all the widows.

According to the doctrine of the *Smṛiti Chandricā*, which is of great and paramount authority in the south of India, a widow, being the mother of daughters, takes her husband's property, both moveable and immoveable, where the family is divided; but a childless widow takes only the moveable property. Where there are two widows, one the mother of daughters and the other childless, the former alone takes the immoveable estate, and the moveable property is equally divided between them.

In default of the widow, the daughter inherits, but neither is her interest absolute. According to the doctrine of the Bengal school, the unmarried daughter is first entitled to the succession: if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have male issue, are together entitled to the succession;* and on failure of either of them, the other takes the heritage. Under no circumstances can the daughters, who are either barren, or widows destitute of male issue, or the mothers of daughters only, inherit the property.

Of the daughter.

* A distinction is made by *Sricrishna*, in his commentary on the *Dāyabhāga*, in respect of unmarried daughters. He is of opinion, that the daughter who is not betrothed is first entitled to the inheritance, and in her default the daughter who is betrothed; but this doctrine is not concurred in by any other authority, and the author of the *Dāyaruhasya* expressly impugns it as untenable.

Distinction
in the Benares
school.

But there is a difference in the law, as it obtains in Benares, on this point, that school holding that a maiden is in the first instance entitled to the property ; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters ; that, in default of indigent daughters, the wealthy daughters are competent to inherit ; but no preference is given to a daughter who has or is likely to have male issue, over a daughter who is barren, or a childless widow.

And in the
Mithila school.

According to the law of Mithilá, an unmarried daughter is preferred to one who is married : failing her, married daughters are entitled to the inheritance ; but there is no distinction made among the married daughters ; and one who is married, and has or is likely to have issue, is not preferred to one who is widowed and barren ; nor is there any distinction made between indigence and wealth.

And where
the family is
undivided.

It may here be mentioned, that the above rule of succession is applicable to Bengal in every possible case ; but, elsewhere, only where the family is divided : for according to the doctrine of the Benares and other schools, even the widow, to whom the daughter is postponed, can never inherit, where the family is in a state of union ; nor can the mother, daughter, daughter's son, or grandmother. The father's heirs in such case exclude them. But though the schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death, in default of issue male. According to the law as received in Benares and elsewhere, it does not go, as her *Stridhun*, to her husband or other heir ; and, according to the law of Bengal also, it reverts to her father's heirs*. In the case of Raj-

* It has been asserted by the author of the *Elements of Hindu Law*, page 161, that property, devolved on a daughter by inheritance

chunder Das, *versus* Dhunmunee, it was determined, that according to the Hindu law as current in Bengal, on the death of a widow who had claimed her husband's property, her daughter will inherit, to the exclusion of her husband's brother, if the daughter have or is likely to have male issue : and on her death without issue, her father's brother will inherit, to the exclusion of her husband*. But a curious case arose at Bombay†, involving the daughter's right, which deserves notice in this place. Of two widows, one had two sons, and the other a daughter. On the death of the latter widow, it became a question who was to succeed to her property, whether her daughter or the rival widow's sons. Various authorities were consulted, and they inclined to the opinion, that the daughter was not entitled to succeed as heir, in as much as property which had devolved on a widow, reverts at her death to her husband's heirs, among whom the daughter would have ranked, in default only of her own brothers.

According to the law of Bengal and Benares, the daughter's sons inherit, in default of the qualified daughters ; but the right of daughters' sons is not recognized by the Mithilâ school. If there be sons of more than one daughter, they take *per capita*, and not as the sons' sons do *per stirpes*‡. If

Of daughters

is classed by the southern authorities as *Stridhun*, and descends accordingly. The authority cited for this doctrine is to be found in that part of the *Mitâcsharâ* treating of woman's peculiar property, and consequently applies to the descent of that alone. I have not been able to meet with any other.

* Sudder Dewanny Adawlut Reports, vol. iii. page 362.

† Elem. Hindu Law, Appendix, p. 392.

‡ The same author states, page 160, that " where such sons are numerous, when they do take. they take *per stirpes*, and not *per capita*.

one of several daughters, who had, as maidens, succeeded to their father's property, die leaving sons and sisters or sisters' sons, then, according to the law of Bengal, the sons alone take the share to which their mother was entitled, to the exclusion of the sisters and sisters' sons*; and, if one of several daughters, who had, as married women, succeeded their father, die leaving sons, sisters, or sisters' sons, according to the same law, the sisters exclude the sons; and if there be no sister, the property will be equally shared by her sons and her sisters' sons. This distinction does not seem to prevail any where but in Bengal. The author of the Considerations on Hindu Law * has stated the following case :—" If there be three sisters who succeed jointly to their father's estate, A, B, and C, and supposing A to die childless, and B and C to survive her. Supposing also B to have one son, and C to have three sons, and supposing C to have died before A, and B to have survived her; it is agreed, that upon the death of A, her estate will go to B; but whether on the death of B, it shall go to her *only*

But the reverse of this is proved by the authority cited in its favour, Dig. vol. iii. page 501. *Jagannātha* there lays down the following rule: " Again, if daughters' sons be numerous, a distribution must be made. In that case, if there be two sons of one daughter, and three of another, five equal shares must be allotted: they shall not first divide the estate in two parts, and afterwards allot one share to each son." This principle was maintained also in the case of *Randhun Sein* and others, v. *Kishenkaunt Sein* and others, it being therein determined, that grandsons by different mothers claiming their maternal grandfather's property, take *per capita*, and not *per stirpes*: *Sudder Dewanny Adawlut Reports*, vol. iii. p. 100.

* Conformably to this doctrine, a case which originated in the *zillah* court of Rungpore, was decided by the *Sudder Dewanny Adawlut*, on the 19th of April 1820, in which it was determined, (See Reports, vol. ii. p. 26,) that property inherited by a daughter goes at her death to her son or grandson, to the exclusion of her sister and sister's son.

son, or be divided between him and the three sons of C, is *vexata quæstio*.” In this case, I apprehend, that if the property had devolved on the daughters at the time they were maidens, then on C's death her property would go to her three sons, and not to her sisters; but if they were married at the time, it would go to her sisters; and on the death of A, to B; and on the death of B, her son and the sons of C would take *per capita*, and this upon the general principle, that property which had devolved on a daughter is taken at her death by the heirs of her father, and not by the heirs of the daughter, and the father's heirs in this case are his daughters' sons, who are entitled to equal shares*. Under no circumstances can a daughter's son's son or other descendant, or her daughter or husband, inherit immediately from her the property which devolved on her at her father's death: such property, according to the tenets of all the schools, will devolve on her father's next heir, and will not go, as her *Stridhun*, to her own heir.

In default of daughters' sons, the father inherits, according to the law as current in Bengal; but according to other schools†, the mother succeeds to the exclusion of the father.

In default of the father, the mother inherits. Her interest, however, is not absolute, and is of a nature similar Of the mother. to that of the widow. In a case of property which had devolved on a mother by the decease of her son, the law

* *Jim. Vuh.* in the *Dâyabhāga*, Chap. xi. Sec. 1. §§ 65. ii.—See Case 5. Chap. Rights of Daughters, &c. vol. ii.

† The different opinions on this point have been more fully stated in the note to Case 14. Rights of Daughters, &c. vol. ii.

officers of the *Sudder Dewanny Adawlut* held, that the rules concerning property devolving on a widow, equally affect property devolving on a mother*. On her death, the property devolves on the heirs of her son, and not on her heirs.

Of the brothers.

In default of father and mother, brothers inherit; first, the uterine associated brethren; next the unassociated brethren of the whole blood; thirdly, the associated brethren of the half blood; and fourthly, the unassociated brethren of the half blood. The above order supposes that the deceased had only uterine or only half brothers, and that they were either all united or all separated. But if a man die, leaving an uterine brother separated, and an half brother associated or reunited, these two will inherit the property in equal shares. Sisters are not enumerated in the order of heirs.

In a case recently decided in the *Sudder Dewanny Adawlut*, a question arose as to the relative rights of a brother and a brother's son to succeed, on the death of a widow, to property which had devolved on her at the death of her husband, they being the next heirs. The *Pundits* at first declared, that a brother's son (his father being dead) was entitled to inherit together with the brother. But this opinion was subsequently proved and admitted to be erroneous. In the succession to the estate of a grandfather, the right of representation unquestionably exists; that is to say, the son of a deceased son inherits together with his uncle: not so in the case of property left by a brother, the brother's son being enumerated in the order of heirs to a childless person's estate after the brother, and entitled to succeed only in default of the lat-

† Case of *Musst, Bijia Dibia, v. Unnapoorna Dibia*, S. D. A. Reports, vol. i. p. 164.

ter. In the case in question, the deceased left two brothers and a widow, and the widow succeeding, one of the brothers died during the time she held possession. The son of the brother who so died claimed, on the death of the widow, to inherit together with his uncle, and the fallacy of the opinion which maintained the justice of his claim consisted in supposing, that on the death of the first brother the right of inheritance of his other two surviving brothers immediately accrued, and that the dormant right of the brother who died secondly was transmitted to his son. But, in point of fact, while the widow survived, neither brother had even an inchoate right to inherit the property, and consequently the brother who died during her lifetime could not have transmitted to his son a right which never appertained to himself*.

In default of brothers, their sons inherit in the same order ; but in regard to their succession, there is this peculiarity, that if a brother's sons, whose father died previously to the devolution of the property, claim by right of representation, they take *per stirpes* with their uncle, being in that case grandsons inheriting with a son ; but when the succession devolves on the brothers' sons alone as nephews, they take *per capita* as daughters' sons do. In the *Subodhini* it is stated, that the succession cannot, under any circumstances, take place *per capita*, but this opinion is overruled. He maintains also, that daughters of brothers inherit. In this opinion he is joined by *Nandu Pandita*, but the doctrine is elsewhere universally rejected†.

Of the brothers' sons.

* Case of Rooderchunder Chowdhry, v. Sumbhoo Chunder Chowdhry, Sudder Dewanny Adawlut Reports, vol. iii. page 106. The same doctrine was maintained in the case of Musst. Jymunee Dibia, *versus* Ramjoy Chowdhry. Ibid. 289.

† See note to *Mitácsharú*, page 348.

And grand-
sons.

Distinction.

If default of brothers' sons, their grandsons inherit in the same order, and in the same manner*, according to the law as current in Bengal; but the law of Benares, Mithilá, and other provinces, does not enumerate the brother's grandson in the order of heirs, and assigns to the paternal grandmother the place next to the brother's son.

Thus far, with the exceptions above noticed, the several schools concur as to the order of inheritance; but they differ more considerably with respect to the remoter heirs, as will be noticed hereafter.

Of sisters
sons.

In default of brothers grandsons, sisters sons inherit, according to the law of Bengal; but according to other schools, the paternal grandmother, as above stated, is ranked next to the brother's son, and the sister's son also is excluded from the enumerated heirs. This point of law was established in a case decided by the Sudder Dewanny Adawlut, in which the suit being for the landed estate of a deceased Hindu, situated in Bengal, by the son of his sister against the son of his paternal uncle, it was ruled, that according to the law of Bengal, the plaintiff would be heir, but according to the law of Mithilá the defendant†.

There is a difference of opinion among different writers of the Bengal school as to the whole and half blood; some main-

* It may be here observed, however, that no re-union after separation can take place with a grandson's brother. Re-union can take place only with the three following relations: the father, the brother, and the paternal uncle. *Vrihaspati*, cited in the *Dáyabháya*, Chap. xi. Sec. 1. §§ 30.

† Case of Rajchunder Narain, v. Goeulchunder Goh, S. D. A. Reports, vol. i. page 43. See also Case 6. page 125, vol. ii.

taining that an uterine sister's son excludes the son of a sister of the half blood : but according to the most approved authorities, there should be no distinction. A sister's daughter is nowhere enumerated in the order of heirs*.

In default of sisters' sons, the inheritance is thus continued, agreeably to the doctrine of the Bengal school, as laid down in the *Dāyacramasangraha*. Brother's daughter's son—Paternal grandfather—Paternal grandmother—Paternal uncle, his son and grandson—Paternal grandfather's daughter's son—Paternal uncle's daughter's son—Paternal great-grandfather—Paternal great-grandmother—Paternal grandfather's brother, his son and grandson—Paternal great-grandfather's daughter's son, and his brother's daughter's son. On failure of all these, the inheritance goes in the maternal line to the maternal grandfather† ; the maternal uncle ; his son and grandson, and daughter's son ; the maternal great-grandfather, his son, grandson, great-grandson, and daughter's son ; and to the maternal great-great-grandfather, his son, grandson, great-grandson, and daughter's son. In default of all these, the property goes to the remote kin-

Of the other heirs according to the *Dāyacramasangraha*.

* *Nanda Pandita* and *Balambhatta* maintain, that the daughters also of sisters have a right of inheritance, but their opinion is universally rejected on this point. See note to *Mitācsharā*, page 318. See also a case reported in Appendix Elem. Hindu Law, page 249.

† It has been remarked by *Jagunnātha*, (page 530, vol. iii.) " That the son of a son's and of a grandson's daughter, and the son of a brother's and of a nephew's daughter, and so forth, claim succession in the order of proximity, before the maternal grandfather ;" but this opinion does not seem to be supported by any authority.

dred in the descending and ascending line, as far as the fourteenth in degree ; then to the spiritual preceptor ; the pupil ; the fellow student* ; those bearing the same family name ; those descended from the same patriarch ; Brahmins learned in the *Vedas* ; and lastly, to the king, to whom, however, the property of a Brahmin can never escheat, but must be distributed among other Brahmins.

And according to *Sricrishna*.

The above order of succession, however, is by no means universally adhered to, even among the writers of the Bengal school. After the sister's son, *Sricrishna Tarcálancára*, in his commentary on the *Dáyabhága*, places the paternal uncle of the whole blood ; the paternal uncle of the half blood ; the son of the paternal uncle of the whole blood ; the son of the paternal uncle of the half blood ; their grandsons successively ; the paternal grandfather's daughter's son ; the paternal grandfather ; the paternal grandmother ; the paternal grandfather's uterine brother ; his half brother ; their sons and grandsons successively ; the paternal great-grandfather's daughter's son ; the *Sapindas* ; the maternal uncle and the rest, who present oblations which the deceased was bound to offer ; the mother's sister's son ; the maternal uncle's sons and grandsons ; the grandson of the son's son, and other descendants for three generations in succession ; the offspring of the paternal grandfather's grandfather, and other ancestors for three generations ; the *Samanodacas* ; and lastly, the spiritual teacher, &c. &c.

* See a Bombay case cited in Elem. Hindu Law Appendix, page 257, in which it was determined, that a fellow hermit is heir to an anchorit ; his pupil to an ascetic ; and his preceptor to a professed student of theology.

The series of heirs is thus stated by the compilers of the *Vivádárnavaśetu* and *Vivádabhaṅgārṇava**. After the sister's son, the grandfather, next the grandmother; and afterwards the enumeration proceeds as follows. Uncle—uncle's son—grandson, and great-grandson—Grandfather's daughter's son—Great-grandfather—Great-grandmother—Their son, grandson, great-grandson, and daughter's son—Maternal grandfather—Maternal uncle, his son and grandson—The deceased's grandson's grandson (in the male line), his great-grandson, and his great-great-grandson. Then the ascending line succeed, namely, the paternal great-grandfather's-father, his son, grandson, and great-grandson†.

And according to other authorities.

The above cited four authorities are of the greatest weight in the province of Bengal; and where they differ, reliance may with safety be placed on the *Dáyacramasangraha* of *Sricrishna*‡. It will be observed, however, that all these authorities concur in the order of enumeration as far as the sister's son, which perhaps is all that will be requisite for practical purposes; and it would be but a waste of time to enter into any disquisition as to the differences of opinion entertained by writers of inferior importance.

* Among modern digests, the most remarkable are the *Vivádarnaśetu*, compiled by order of Mr. Hastings; *Vivádasarṇava*, compiled at the request of Sir William Jones; and the *Vivádabhaṅgārṇava*, by *Jagannátha*.—Colebrooke's Preface to Digest, page 23.

† *Jagannátha* so far differs from the series here given, that he assigns a place next to the maternal uncle's grandson to the maternal great-grandfather and the maternal great-great-grandfather and their descendants. He also is of opinion, that of the male descendants of the paternal grandfather and great-grandfather, those related by the whole blood should exclude those of the half blood.

‡ See the opinion of Mr. Colebrooke, cited in *Elem. Hindu Law*, Appendix, 261.

Order of succession according to the Benares school.

According to the law as current in Benares, in default of the son, and son's son and grandson, the widow (supposing the husband's estate to have been distinct and separate) succeeds to the property under the limited tenure above specified. But if her husband's estate was joint, and held in coparcenary, she is only entitled to maintenance.

In default of the widow, the maiden daughter inherits. In her default, the married indigent daughter. In her default, the married wealthy daughter. Then the daughter's son, but the *Vivádachandra*, the *Vivádaratnacara*, and *Vivádachintámani*, authorities which are current in Mithilá, do not enumerate the daughter's son among the series of heirs*. The mother ranks next in the order of succession†, and after her

* According to the commentary of *Balambhatta*, the daughter's daughter inherits, in default of the daughter's son ; but this is not the received opinion : and in a case decided by the court of Sudder Dewanny Adawlut, according to the law of Bengal, (Sudder Dewanny Adawlut Reports, vol. ii. p. 290,) it was determined, where two of four daughters died during the lifetime of their mother, and one of them left a daughter, which daughter sued her aunts for a fourth of the property in right of her mother, that there was no legal foundation for the claim.

† The same commentator says, the father should inherit first, and then the mother. *Nanda Pandita*, the author of a commentary on the *Mitáśhará*, concurs in the opinion of *Balambhatta*. *Apararca*, another commentator, *Camalacara*, the author of the *Vivádatandava*, the authors of the *Smritichandricá*, *Madana Rutna*, *Vyavaháramayú'cha*, *Vivádachandrica*, *Rutnácara*, and other authorities current in Benares, give the father the preference over the mother, and *Jimutavahana*, *Raghunandana*, and all other Bengal authorities adopt this doctrine ; but all the other Benares authorities follow the text of the *Mitáśhará*, which assigns the preference to the mother, while *Sricara* maintains that the father and mother inherit together.

the father. In default of him, brothers of the whole blood succeed; and in their default, those of the half blood*.

In their default, their sons inherit successively†; then the paternal grandmother‡; next the paternal grandfather; the paternal uncle of the whole blood; of the half blood; their sons successively; the paternal great-grandmother§; the paternal grandfather, his son and grandson, successively; the paternal great-grandfather's mother||; his father, his brother, his brother's son. In default of all these, the *Sapindas* in the same order as far as the seventh in degree, which includes only one grade higher in the order of ascent than the heirs above enumerated. In default of *Sapindas*, the *Samanodacas* succeed; and these include the above enumerated heirs in the same order as far as the fourteenth in degree¶. In default of the *Samanodacas*, the *Bundhoos* or cognates succeed. These kindred are of three descriptions; personal, paternal, and maternal. The personal kindred are, the sons of his own father's sister; the sons of his own mother's sister, and the sons of his own maternal uncle. The paternal kindred are,

* *Balambhatta* is of opinion, that brothers and sisters should inherit together; but this doctrine is not received.

† And, according to *Balambhatta*, brothers' daughters, and brothers' sons inherit together; but neither is this opinion followed.

‡ *Sricara Acharjya* maintains, that the brothers' grandsons have a title to the succession in default of the brothers' sons; and this opinion is also held by the author of the *Vivádachandricá*, but by no other authority; and there is the same difference of opinion, as to the relative priority of the grandmother, as has been noticed in the case of the father and mother.

§ The same difference of opinion exists in this case also.

|| And in this case.

¶ The term *Gotraja* (or gentiles) has been defined to signify *Sapindas* and *Samanodacas* by *Balambhatta*; and in the *Subodhini*, &c.

the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. His maternal kindred are, the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle*. In default of them, the *Ach- arjya* or spiritual preceptor, the pupil, fellow student in theology, learned Brahmins; and lastly, always excepting the property of Brahmins, the estate escheats to the ruling power.

The order of succession as it obtains in Mithilá corresponds with what is here laid down. In the case of *Gungadutt Jha, v. Sreenarain and Musst. Leelawutee*, (Sudder Dewanny Adawlut Reports, vol. ii. page 11,) it was determined, that according to the law as current in Mithilá, claimants to inheritance, as far as the seventh (*Sapindas*) and even the fourteenth in descent (*Samanodacas*) in the male line from a common ancestor, are preferable to the cousin by the mother's side of the deceased proprietor; that is to say, his mother's sister's son. Had the case in question being decided according to the law of Bengal, (which, the parties there residing, would have so happened: had it not been determined that a person settling in a foreign district shall not be deprived of the laws of his native district, provided he adhere to its customs and usages,) the mother's sister's son would have obtained the preference; that individual ranking, agreeably to the law of Bengal, between the *Sapindas* and the *Samanodacas*, as was exempli-

According to other schools.

§ See *Mitácshará*, page 352. In this series, no provision appears to have been made for the maternal relations in the ascending line; but *Vachaspathimisra* in the *Vivádachintámání*, assigns to "the maternal uncle and the rest," (*Matooladi*,) a place in the order of succession next to the *Samanodacas*; and *Mitramisra*, in the *Veeramitrodaya*, expresses his opinion, that as the maternal uncle's son inherits, he himself should be held to have the same right by analogy.

lied in the case of *Roopchurn Mohapater, v. Anund Lal Khan*, (Sudder Dewanny Adawlut Reports, vol. ii. page 35,) in which it was determined, according to an exposition of the Hindu law as current in Bengal, that the son of a maternal uncle (who is also a *Bundhoo*) takes the inheritance in preference to lineal descendants from a common ancestor, beyond the third in ascent.

The order of succession, agreeably to the law as current in the south of India, does not appear to differ from that of Benares.

In the *Vyavahāramayūc'ha*, an authority of great eminence in the west of India, a considerable deviation from the above order appears; and the heirs, after the mother, are thus enumerated. The brother of the whole blood, his son, the paternal grandmother, the sister*, the paternal grandfather, and the brother of the half blood, who inherit together. In default of these, the *Sapindas*, the *Samanodacas*, and the *Bundhoos* inherit successively, according to their degree of proximity.

It may be stated, as a general principle of the law as applicable to all the schools, that he with whom rests the right of performing obsequies is entitled to preference in the order of succession; but there are exceptions to this rule; for

* The Bombay Reports, vol. ii. page 471, exhibit a case demonstrative of the sister's right according to this doctrine, and in a suit between two cousins for the property of their maternal uncle, it was held that neither had any right during the lifetime of their uncle's sister. There is another similar case in vol. i. page 71. But this admission of the sister seems peculiar to the doctrine followed on that side of India. See Colebrooke, cited in Appendix, *Elem. Hindu Law*, page 252.

instance, in the case of a widow dying and leaving a brother and daughter her surviving, the daughter takes to the exclusion of the brother, although the exequial ceremonies must be performed by the latter*. The passages of Hindu law which intimate that the succession to the estate and the right of performing obsequies go together, do not imply that the mere act of celebrating the funeral rites gives a title to the succession ; but that the successor is bound to the due performance of the last rites for the person whose wealth has devolved on him†.

* Elem. Hin. Law, App. p. 245 and 251.

† Note to S. D. A. Reports, vol. i. p. 22.

CHAPTER III.

OF STRIDHUN, OR WOMAN'S SE- PARATE PROPERTY.



This description of property is not governed by the ordinary rules of inheritance. It is peculiar and distinct, and the succession to it varies according to circumstances. It varies according to the condition of the woman, and the means by which she became possessed of the property*.

* According to the Hindu law, there are several sorts of this species of property, some of which are as follows. *Adhyagnica*, or what was given before the nuptial fire. *Adhyabahana*, or what was given at the bridal procession. *Preetidutta*, or what was given in token of affection. *Mätripitri* and *Bhrátridutta*, or what was received from a mother, father, and brother. *Adhividhanica*, or a gift on a second marriage, i. e. wealth given by a man for the sake of satisfying his first wife, when desirous of espousing a second. *Paranayayung*, or *paraphernalia*. *Anwadhayica*, or gift subsequent. *Sowdayica*, or gift from affectionate kindred. *Sulca*, or perquisite. *Yautuca*, or what was received at marriage. *Padabundanica*, or what was given to the wife in return of her humble salutation. Some lawyers class the *Preetidutta* and the *Padabundanica* as one species of woman's property, under the appellation of *Lavanyarjita*, or what was gained by loveliness.

In the *Mitácshará*, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*. Authors differ in their enumeration of the various sorts of *Stridhun*, some confining the number to eight, others to six, others to five, and others to three; but as the difference consists in a more or less comprehensive classification, it does not require any particular notice. The most comprehensive definition of a married woman's *peculium*, is given in the following text of *Menu*.:—"What was given before the nuptial fire, what was given at the bridal procession, what was given in token of love, and what was received from a mother, a brother, or a father, are considered as the sixfold separate property of a married woman*." And it may be here observed, that *Stridhun* which has once devolved according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterward governed by the ordinary rules of inheritance: for instance, property given to a woman on her marriage is *Stridhun*, and passes to her daughter, at her death; but at the daughter's death, it passes to the heir of the daughter like other property; and the brother of her mother would be heir in preference to her own daughter, such daughter being a widow without issue.

Definition
of *Stridhun*,
according to
Menu.

Succession to

Where the
deceased was
unmarried;

To such property left by an unmarried woman, the heirs are her brother, her father, and her mother successively; and failing these, her paternal kinsmen in due order.

And where
married.

To such property left by a married woman given to her at the time of her nuptials, the heirs are her daughters; the maiden, as in the ordinary law of inheritance, ranking first,

and then the married daughter likely to have male issue*. The barren and the widowed daughters, failing the two first, succeed as coheirs. In default of daughters, the son succeeds; then the daughter's son†, the son's son, the great-grandson in the male line, the son of a contemporary wife, her grandson and her great-grandson in the male line. In default of all these descendants, supposing the marriage to have been celebrated according to any of the five first forms‡, the husband succeeds, and the brother, the mother, the father. But if celebrated according to any of the three last forms§, the brother is preferred to the husband, and both are postponed to the mother and father. In default of these, the heirs are successively as follows:—Husband's younger brother, his younger brother's son, his elder brother's son, the sister's son, husband's sister's son, the brother's son, the son-in law, the father-in-law, the elder brother-in-law, the *Sapindas*, the *Saculyas*, the *Samanadpcas*.

To such property left by a married woman given to her by her father, but not at the time of her nuptials, the heirs are

And if given
to her by her
father.

* It may here be mentioned, that at the death of a maiden or betrothed daughter on whom the inheritance had devolved, and who proved barren, or on the death of a widow who had not given birth to a son, the succession of the property which they had so inherited will devolve next on the sisters having and likely to have male issue; and in their default, on the barren and widowed daughters.

† According to *Jimutavahana*, the right of the daughter's son is postponed to that of the son of the contemporary wife; but his opinion in this respect is refuted by *Sricrishna* and other eminent authorities.

‡ For an enumeration of these forms, see the chapter on Marriage.

§ The justice of this order of succession does not at first sight seem obvious, at least as regards the *Asura* marriage, where money is advanced by the family of the bridegroom, and to which, therefore, it would appear equitable that it should revert on the death of the bride.

successively, a maiden daughter, a son, a daughter who has or is likely to have male issue, daughter's son, son's son, son's grandson, the great-grandson in the male line, the son of a contemporary wife, her grandson, her great-grandson in the male line. In default of all these, the barren and the widowed daughters succeed as coheirs, and then the succession goes as in the five first forms of marriage.

And if not
given to her by
her father.

To such property left by a married woman not given to her by her father, and not given to her at the time of her nuptials, the heirs are in the same order as above, with the exception that the son and unmarried daughter inherit together, and not successively, and that the son's son is preferred to the daughter's son*.

Power of a
woman over
her *Stridhun*.

It may here be observed, that the Hindu law recognizes the absolute dominion of a married woman over her separate and peculiar property, except land given to her by her husband, of which she is at liberty to make any disposition at pleasure. He has nevertheless power to use the woman's *peculium*, and consume it in case of distress; and she is subject to his control, even in regard to her separate and peculiar property†.

* But *Raghumandana* holds, that in the case of a married woman dying without issue, the husband alone has a right to the property of his wife, bestowed on her by him after marriage; but that the brother has in such case the prior right to any property which may have been given to her by her father and mother.

† The order above given is chiefly taken from Colebrooke's translation of the *Dáyabhāga*, page 100. I do not find that the law in this particular varies materially in the different schools; except that (as in the case of succession to ordinary property) a distinction is made by the law of Benares and other schools, between wealthy and indigent

daughters. There are also many other nice distinctions and discrepancies of opinion, of which the following are specimens, and which it is unimportant to notice at greater length in this place. According to *Jinutavāhana* and the mass of Bengal authorities, the property of a deceased woman not received at her nuptials, and not given to her by her father, goes to her son and to her unmarried daughters in equal portions, whether the latter have been betrothed or otherwise. *Jagannātha* is of opinion, that the succession of a daughter who has been betrothed is barred by the claim of one who has not been affianced, and that both cannot have an equal right to inherit with a brother. *Raghunandana* denies that there is any text justifying the succession of a betrothed daughter. The authors of the *Vyavahāramayoc'ha*, and *Veeramitrodaya* distinctly state, that in default of a maiden daughter, a married one whose husband is living takes the inheritance with her brother. According to the *Mitīcsharā* and other ancient authorities current in Benares, the brothers and sisters cannot under any circumstances inherit together; while *Madhavāchārjya* states, that sons and daughters inherit their mother's *peculium* together, only where it was derived from the family of the husband; and *Vachaspati Bhuttāchārjya*, on the other hand, contends that they inherit simultaneously in every instance, excepting that of property received at nuptials, and given by parents. The conflicting doctrines in matters such as the above, of minor moment, might be multiplied almost *ad infinitum*.

CHAPTER IV.

OF PARTITION.



Having treated of the subject of property acquired by succession, it remains to treat of that which is acquired by partition while the ancestor survives, and by partition among the heirs, after succession.

The father's consent is requisite to partition, and, while he lives, the sons have not, according to the law of Bengal, the power to exact it, excepting under such circumstances as would altogether divest him of his proprietary right, such as his degradation, or his adoption of a religious life. *Jagannátha* has, indeed, expressed an opinion, that sons, oppressed by a step-mother or the like, may apply to the king, and obtain a partition from their father of the patrimony inherited from the grandfather, though not a partition of wealth acquired by the father himself. To the father's right of making a partition there is but one condition annexed, namely, that the mother be past childbearing, and this condition applies to ancestral immoveable property alone as to his self-acquired estate, whether it consist of moveable or immoveable property, and the ancestral property of whatever description which may have been usurped by a stranger, but recovered by the father, his own consent is the only requisite to partition. But the law as current in Benares and other schools, differs widely from that of Bengal, in

Father's consent requisite to partition in Bengal.
Exception.

Opinion of *Jagannátha*.

Condition.

Partition of ancestral estate demandable by sons according to the law of Benares.

respect to partition of the ancestral estate, which, according to the former, may be enforced at the pleasure of the sons, if the mother be incapable of bearing more issue, even though the father retain his worldly affections, and though he be averse to partition*.

How to be made by the father according to the law of Bengal.

According to the law of Bengal, the father may make an unequal distribution of property acquired by himself exclusively, as well as of moveable ancestral property, and of property of whatever description, recovered by himself, retaining in his own hands as much as he may think fit; and should the distribution he makes be unequal, or should he without just cause exclude any one of his sons, the act is valid, though sinful; not so with respect to the ancestral immoveable estate and property, to the acquisition of which his sons may have contributed: of such property the sons are entitled to equal shares; but the father may retain a double share of it, as well as of acquisitions made by his sons.

And Benares. The law of Benares, on the other hand, prohibits any unequal distribution by the father of ancestral property of whatever description, as well as of immoveable property acquired by himself. At a distribution of his own personal acquisitions even, he cannot, according to the same law, reserve more than two shares for himself; and as the maxim of *factum valet*. does not apply in that school, any unequal distribution of real property must be considered as not only sinful, but illegal†.

* *Mitac*. Ch. i. Sec. 2. §§ 7.

† Though as the father is not precluded from disposing of moveables at his discretion, a *gift* of such property to one son should not be deemed invalid. Colebrooke, cited in *Elem. Hin. Law*, App. p. 5; and as to the father's incompetency to dispose of immoveable property, though acquired by himself, see *Ibid*. p. 7.

This subject has been treated of at great length by the author of the *Considerations on Hindu Law*, in the chapter on gifts and unequal distribution: and though he confesses it to be one of a most perplexing nature, from the variety of opposite decisions to which it has given rise, yet he inclines to the opinion, that a gift of even the entire ancestral immoveable property to one son, to the exclusion of the rest, is sinful, but nevertheless *valid*, if made. It must be recollected, that he was treating of the law as current in Bengal only, and not elsewhere. My reasons for arriving at an opposite opinion are; first, because the doctrine for which I contend has been established by the latest decision, founded on a more minute and deliberate investigation of the law of the case than had ever before been made; and secondly, because the only authority for the reverse of this doctrine consists in the following passages from the *Dāyabhāga*:—"The texts of *Vyāsa* exhibiting a prohibition are intended to show a moral offence; they are not meant to invalidate the sale or other transfer. Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null, for a fact cannot be altered by a hundred texts." Now if these passages are to be taken in a general sense; if they are to be held to have the effect of legalising or at least rendering valid all acts committed in direct opposition to the law, they must have the effect of superseding all law; and it would be better at once to pronounce those texts alone to be the guide for our judicial decisions. The example adduced by the commentator to illustrate these texts, clearly shows the spirit in which this unmeaning, though mischievous dogma was delivered; he declares, that a fact cannot be altered by a hundred texts, in the same manner as the murder of a Brahmin, though in the highest degree criminal and unlawful, having been perpetrated, there is no remedy, or in other words, that

Argument
against un-
equal partition
in certain
cases.

the defunct Brahmin cannot be brought to life again. The illustration might be apposite, if there were no such thing as retribution, and if the law did not exact all possible amends for the injury inflicted. But what renders this conclusion less disputable is, that the texts of *Vyása* in question occur in the chapter of the *Dáyabhága* which treats of self-acquisitions, and has no reference to ancestral property. If any additional proof be wanting of the father's incompetency to dispose of ancestral real property by an unequal partition, or to do any other act with respect to it which might be prejudicial to the interests of his son, I would merely refer to the provision contained in Chap. iii. Sect. 7, §§ 10. of the translation of the extract from the *Mitácshará* relative to judicial proceedings. The rule is in the following terms: "The ownership of father and son is the same in land which was acquired by his father," &c. From this text it appears, that in the case of land acquired by the grandfather, the ownership of father and son is equal; and therefore, if the father make away with the immoveable property so acquired by the grandfather, and if the son has recourse to a court of justice, a judicial proceeding will be entertained between the father and son." The passage occurs in a dissertation as to who are fit parties in judicial proceedings; and although the indecorum of a contest wherein the father and son are litigant parties has been expressly recognized, yet, at the same time, the rights of the son are declared to be of so inviolable a nature, that an action by him for the maintenance of them will lie against his father, and that it is better there should be a breach of moral decorum than a violation of legal right.

The question as to the extent to which an unequal distribution made by a father in the province of Bengal should be upheld, has been amply discussed also in the report of a case decided by the court of *Sudder Dewanny Adaw-*

lut in the year 1816*, wherein it was determined, that an unequal distribution of ancestral immoveable property is illegal and invalid, and that the unequal distribution of property acquired by the father, and of moveable ancestral property, is legal and valid, unless when made under the influence of a motive which is held in law to deprive a person of the power to make a distribution. It was declared, in a note to that case, that the validity of an unequal distribution of ancestral immoveable property, such as is expressly forbidden by the received authorities on Hindu law, cannot be maintained on any construction of that law, by *Jimutavāhana* or others. *Jagannātha*, in his Digest, maintains an opinion opposite to this, and lays it down, that if a father, infringing the law, absolutely give away the whole or part of the immoveable ancestral property, such gift is valid, provided he be not under the influence of anger or other disqualifying motive: and admitting this doctrine to be correct, it must be inferred *a fortiori* that he is authorized to make an unequal distribution of such property; but the reverse of this doctrine has been established by the mass of authorities cited in the case above alluded to.

Case cited.

Opinion of
Jagannātha
overruled.

In the event of a son being born after partition made by the father, he will be sole heir to the property retained by the father; and if none have been retained, the other sons are bound to contribute to a share out of their portions. According to *Jimutavāhana*, *Raghunandana*, *Sricrishna*, and other Bengal authors, when partition is made by a father, a share equal to that of a son must be given to the childless wife, not to her who has male issue. But the doctrine laid down by *Harinātha* is, that if the father reserve two or more shares, no share need be assigned to the wives,

Right of
son born after
partition.

Childless
wives entitled
to share ac-
cording to Ben-
gal authorities.

Opinion of
Harinātha.

* For the whole of the argument, see *Sudder Dewanny Adawlut Reports*, vol. ii. page 214.

Vivádárnavasetu.

because their maintenance may be supplied out of the portion reserved. It is also laid down in the *Vivádárnavasetu*, that an equal share to a wife is ordained, in a case where the father gives equal shares to his sons ; but that where he gives unequal portions, and reserves a larger share for himself, he is bound to allot to each of his wives, from the property reserved by himself, as much as may amount to the average share of a son. These shares to wives are allotted only in case of no property having been given to them. According to some authorities, if she had received property elsewhere, a moiety of a son's share should be allotted to them ; but according to other authorities, the difference should be made up to them between what they have received and a son's share. The doctrine maintained by *Jugunnátha* is, that if the wife has received, from any quarter, wealth which would have devolved ultimately on her husband, such wealth should be included in the calculation of her allotment ; but if she received the property from her own father or other relative, or from the maternal uncle or other collateral kinsman of her husband, it should not be included, her husband not having any interest therein.

Rule where the wife has received property.

The law as current in Benares, Mithilá, and elsewhere, differs from the Bengal school on this subject, and is not in itself uniform or consistent. *Vijnyaneswara* ordains : " When the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by their husband or father-in-law, must be made participants of shares equal to those of sons." But if separate property had been given, the same authority subsequently directs the allotment of half a share ; " or if any had been given, let him assign the half." According to *Madhaváchárjya*, if the father by his own free will make his sons equal participants, he ought to make his wives, to whom no separate property has

Doctrines of the Benares and other schools as to the shares of wives.

been given, partakers of a share equal to that of a son; but if such property has been presented to her, then a moiety should be given. *Cumulacara*, the author of the *Vivāda-tandava*, declares generally, that whether the father be living or dead, his wives are respectively entitled to a son's portion. But *Sulapani*, in the *Dipacalica*, maintains, that if the father make an equal partition among his sons by his own choice, he must give equal shares to such of his wives only as have no male issue: and *Helayudha* also lays it down, that wives who have no sons are here intended. *Misra* contends, that "when he reserves the greater part of his fortune, and gives some trifle to his sons, or takes a double share for himself, the husband must give so much wealth to his wives out of his own share alone: accordingly, the separate delivery of shares to wives is only ordained when he makes an equal partition." The sum of the above arguments seems to be, that in the case of an equal partition made by a father among his sons, his wives who are destitute of male issue take equal portions; that, where he reserves a large portion for himself, his wives are not entitled to any specific share, but must be maintained by him; and that, where unequal shares are given to sons, the average of the shares of the sons should be taken for the purpose of ascertaining the allotments of the wives. The same rules apply also to paternal grandmothers, in case of partition of the ancestral property.

Sum of the arguments.

At any time after the death, natural or civil, of their parents, the brethren are competent to come to a partition among themselves of the property, moveable and immovable, ancestral and acquired; and, according to the law as received in the province of Bengal, the widow is not only entitled to share an undivided estate with the brethren of her husband, but she may require from them a partition of it,

Partition when to be made by brethren.

although her allotment will devolve on the heirs of her husband after her decease*. Partition may be made also while the mother survives. This rule, though at variance with the doctrine of *Jimutavahana*, has nevertheless been maintained by more modern authorities, and is universally observed in practice†.

Rights of
nephews.

Nephews whose fathers are dead, are entitled, as far as the fourth in descent, to participate equally with the brethren. These take *per stirpes*, and any one of the coparceners may insist on the partition of his share‡.

Of mothers
and daughters.

* But in all such cases, to each of the father's wives who is a mother, must be assigned a share equal to that of a son, and to the childless wives a sufficient maintenance; but according to the *Mitacsarā* and other works current in Benares and the southern provinces, childless wives are also entitled to shares, the term *mata* being interpreted to signify both mother and step-mother. The *Smritichandrica* is the only authority which altogether excludes a mother from the right of participation. To the unmarried daughters such portions are allotted as may suffice for the due celebration of their nuptials§. This portion has been fixed at

* See note to the case of Bhyroochund Rai, v. Russoomunee, *Sudder Dewanny Adawlut Reports*, vol. i. p. 28, and case of Neelkaunt Rai, v. Munee Chowdrain, *Ibid.* 58; also case of Rani Bhawani Dibia and another, v. Ranee Soorujmunee, *Ibid.* p. 135. The reverse is the case, according to the law of Benares. See the case of Duljeet Singh, v. Sheomunook Singh, *Ibid.* 59.

† Dig. 3, 78.

‡ *Catáyana*, cited in Dig. 3, 7; and see *Elem. Hindu Law*, Appendix, 292.

§ *Ibid.* 86. and 97.

a fourth of the share of a brother : in other words, supposing there is one son and one daughter, the estate should be made into two parts, and one of those two parts made into four. The daughter takes one of these fourths. If there be two sons and one daughter, the estate should be made into three parts, and one of these three parts made into four. The daughter takes one of these fourths, or a twelfth. If there be one son and two daughters, the estate should be made into three parts, and two of those three parts made into four. The daughters take each one of these fourths*. But according to the best authorities, these proportions are not universally assignable; for where the estate is either too small to admit of this being given without inconvenience, or too large to render the gift of such portion unnecessary to the due celebration of the nuptials, the sisters are entitled to so much only as may suffice to defray the expenses of the marriage ceremony. In fine, this provision for the sisters, intended to uphold the general respectability of the family, is accorded rather as a matter of indulgence, than prescribed as a matter of right†.

Sisters interests undefined.

Any improvement to joint property effected by one of the brethren, does not confer on him a title to a greater share‡; but an acquisition made by one, by means of his own un-

* *Mit.* on Inh. Chap. i. §§ 7.

† The question has been fully discussed by the author of the *Considerations on Hindu Law*, page 103 et seq. The inconsistency of the rules has been pointed out; but the same conclusion is arrived at, namely, that the sister's is a claim rather than a right. See the opinion of Mr. Sutherland, cited in *Elem. Hin. Law*, App. p. 301, which is to the same effect; and of Mr. Colebrooke, *Ibid.* p. 361 and 385.

‡ *Mitac.* Chap. i. Sec. 3, §§ 4; and Case 15, vol. ii. Chap. Effects liable and not liable to Partition, (note.)

Share of the
acquirer.

According to
the law of Be-
nares.

Case of land
recovered.

assisted and exclusive labour, entitles the acquirer, according to the law as current in Bengal, to a double share on partition. And it was ruled by the Sudder Dewanny Adawlut, that where an estate is acquired by one of four brothers living together, either with aid from joint funds, or with personal aid from the brothers, two fifths should be given to the acquirer, and one fifth to each of the other four*. But according to the law as current in Benares, the fact of one brother's having contributed personal labour while no exertion was made by the other, is not a ground of distinction. If the patrimonial stock was used, all the brethren share alike†. If the joint stock have not been used‡, he by whose sole labour the acquisition has been made is alone entitled to the benefit of it§. And where property has been acquired without aid from joint funds, by the exclusive industry of one member of an undivided family, others of the same family, although they were at the time living in coparcenary with him, have no right to participate in his acquisition||. The rule is the same with respect to property recovered, excepting land, of which the party recovering it is entitled to a fourth more than the rest of his brethren¶. It has also been

* S. D. A. Rep. vol. i. page 6.

† See note to Case 4. Chap. of Sons, &c. vol. ii.

‡ What constitutes the use of joint stock is not unfrequently very difficult to determine, and no general rule can be laid down applicable to all cases that may arise. Each individual case must be decided on its own merits. See Elem. Hindu Law, App. p. 306.

§ Dig. 3, 110.

|| Kaleepershaud Rai and others, v. Digumber Rai and others, vol. ii. p. 237.

¶ *Sancha*, cited in Ibid. 365 ; and Elem. Hin. Law, App. p. 313.

ruled, that if lands are acquired partly by the labour of one brother, and partly by the capital of another, each is entitled to half a share; and that if they were acquired by the joint labour and capital of one, and by the labour only of the other, two thirds should belong to the former, and one-third to the latter; but this provision seems rather to be founded on a principle of equity than any specific rule of Hindu law*.

Presents received at nuptials, as well as the acquisitions of learning and valour, are, generally speaking, not claimable by the brethren on partition; and there are some things not subject to the ordinary law of partition: but for a more detailed account of indivisible and specially partible, the reader is referred to the translation of *Jugunnátha's Digest*, vol. iii. page 332 *et seq.* and to the chapter in vol. ii. treating of effects liable and not liable to partition. According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property: in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother†.

Property not
subject to par-
tition.

Partition may be made without having recourse to writing or other formality; and in the event of its being disputed at any subsequent period, the fact may be ascertained by circumstantial evidence. It cannot always be inferred from the manner in which the brethren live, as they may reside apparently in a state of union, and yet, in matters of property, each may be separate; while, on the other hand, they

Evidence of
partition.

* Case of *Koshul Chukrawutee, v. Radhanauth*, S. D. A. Reports, vol. i. page 336.

† *Elem. Hin. Law*, App. p. 322.

may reside apart, and yet may be in a state of union with respect to property : though it undoubtedly is one among the presumptive proofs to which recourse may be had, in a case of uncertainty, to determine whether a family be united or separate in regard to acquisitions and property*. The only criterion seems to consist in their entering into distinct contracts, in their becoming sureties one for the other, or in their separate performance of other similar acts, which tend to show, that they have no dependance on or connexion with each other†. In case of an undivided Hindu family, the court of *Sudder Dewanny Adawlut* were of opinion that their acquisitions should be presumed to have been joint till proved otherwise, the *onus probandi* resting with the party claiming exclusive right‡; and, in another case, a member of a Hindu family, among whom there had been no formal articles of separation, but who, as well as his father, messed separately from the rest, and had no share of their profits and loss in trade, though he had occasionally been employed by them, and had received supplies for his private expenses, was presumed to be separate, and not allowed a share of the acquisition made by others of the family§. The law is particularly careful of the rights of those who may be born subsequent to a partition made by the father. With respect to ancestral property, it is not likely that the just

* See note to *Sudder Dewanny Adawlut Reports*, vol. i. page 36.

† Dig. 3. 414; and see cases, Chap. of Evidence of Partition; also *Colebrooke*, cited in *Appendix Elem. Hindu Law*, page 325 et seq.

‡ Case of *Gourchrunder Rai and others, v. Hurroohchunder Rai and others*, *S. D. A. Reports*, vol. iv. page 162.

§ *Rajkishor Rai and others, v. the widow of Santoo Das*, *S. D. A. Reports*, vol. i. 13.

claims of any of the heirs can be defeated, as the law prohibits partition so long as the mother is capable of bearing issue; but to guard against the possibility of such an occurrence, it is provided, that the father shall retain two shares, to which shares, if a son be subsequently born, he is exclusively entitled. There is another provision also which forms an effectual safeguard against the destitution of children born subsequently to a partition, which consists in the father's right of resumption, in case of necessity, of the property which he may have distributed among his sons*.

* See Case 3. Chap. of Partition, vol. ii.

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* See Case 3. Chap. of Partition, vol. ii.

CHAPTER V.

OF MARRIAGE.



On the subject of marriage, it may be presumed that it has not often constituted a matter of litigation in the civil courts, from the circumstance, that points connected with it do not appear to have been referred to the Hindu law officers. Disputes connected with this topic, as well as those relating to matters of caste generally, are, for the most part, adjusted by reference to private arbitration. It is otherwise in the provinces subject to the presidencies of Madras and Bombay, where many matrimonial disagreements and questions relative to caste have been submitted to the adjudication of the established European courts*. As, however, questions relative to marriage are among those which the Company's courts are, by law, called upon to decide, it may not be amiss to cite some of the fundamental rules connected with the institution.

Marriage, among the Hindus, is not merely a civil contract, but a sacrament ; forming the last of the ceremonies prescrib-

* See Appendix Elements Hindu Law, page 22 et passim, and Bombay Reports, pages 11, 35, 363, 370, 379, and 389, vol. i. and pages 108, 323, 434, 473, 576, and 685, vol. ii.

ed to the three regenerate classes, and the only one for *Sudras**; and an unmarried man has been declared to be incapacitated from the performance of religious duties†. It is well known that women are betrothed at a very early period of life, and it is this betrothment, in fact, which constitutes marriage. The contract is then valid and binding to all intents and purposes. It is complete and irrevocable immediately on the performance of certain ceremonies‡, without consummation. Second marriages, after the death of the husband first espoused, are wholly unknown to the Hindu law§; though in practice, among the inferior castes, nothing is so common. Polygamy is also legally prohibited to men, unless for some good and sufficient cause, such as is expressly declared a just ground for dissolving the former contract, as barrenness, disease, or the like. This precept, however, is not much adhered to in practice. The text of *Menu*, which in fact prohibits polygamy, has been held, according to modern practice, to justify it. “For the first marriage of the twice-born classes,” says *Menu*, “a woman of the same class is recommended; but for such as are impelled by inclination to marry again, women in the direct order of the classes are to be preferred ||.” From this text it is argued by

* Digest, vol. iii. page 104.

† Ibid. ii. page 400.

‡ Ibid. page 484; and for an account of ceremonies observed at a marriage, see As. Res. vol. vii. page 288; also Ward on the Hindus, vol. i. page 130 et seq.

§ But a widow who, from a wish to bear children, slights her deceased husband by marrying again, brings disgrace on herself here below, and shall be excluded from the seat of her lord.—*Menu*, cited in Dig. page 463, vol. ii.

|| *Menu*, Chap. iii. §§ 12.

the moderns, that, as marriage with any woman of a different class is prohibited in the present age, it necessarily follows that a plurality of wives of the same class is admissible; but the inference appears by no means clear, and the practice is admitted by the *pundits* to be reprehensible; though nothing is more common, especially among the *Kooleen*, or highest caste of Brahmins.

In the event of a man forsaking his wife without just cause, and marrying another, he shall pay his first wife a sum equal to the expenses of his second marriage, provided she have not received any *Stridhun*, or make it up to her, if she have; but he is not required, in any case, to assign more than a third of his property. In all cases, and for whatever cause a wife may have been deserted, she is entitled to sufficient maintenance. In the *Mitácshará*, a distinction is made. Where a second wife is married, there being a legal objection to the first, she is entitled to a sum equal to the expenses incurred in the second marriage; but, where no objection whatever exists to the first wife, a third of the husband's property should be given as a compensation*. But in modern practice, a husband considers it quite sufficient to maintain a superseded wife by providing her with food and raiment.

There are eight forms of marriage: The *Bramah*, *Daiva*, *Arsha*, *Prajapatya*, *Asura*, *Gandharva*, *Rácshasa*, and *Paisacha*.

The four first forms are peculiar to the *Brahminical* tribe. The principle in these contracts seems to be, that the parties

* *Yágyavalkya*, cited in Dig. vol. ii. page 420; and see a case to this effect stated, Elem. Hin. Law, App. p. 51.

are mutually consenting, and actuated by disinterested motives.

The fifth form is peculiar to *Vaishyas* and *Sudras*. It is reprobated, on the principle of its being a mercenary contract, consented to by the father of the girl for a pecuniary consideration. The sixth and seventh forms are peculiar to the military tribe, where the union is founded either on reciprocal affection or the right of conquest. And the eighth or last is reprobated for all, being accomplished by means of fraud and circumvention*.

The most usual form of marriage is that of the *Brahma*, which is completed "when the damsel is given by her father, when he has decked her, as elegantly as he can, to the bridegroom whom he has invited," the nuptials of course being celebrated with the usual ceremonies. The next species of marriage most usually practised is that of the *Asura*, where a pecuniary consideration is received by the father; and I am given to understand that marriages by the *Paisacha* mode are not uncommon; and that young women, who from their wealth or beauty may be desirable objects, are, not unfrequently, inveigled by artifice into matrimony; the forms of which once gone through, the contract is not dissoluble on any plea of fraud, or even of force†.

* Digest, vol. iii. page 606.

† This is not the only instance in which fraud is legalized by the Hindu law. That law sets aside gifts or promises made for the purpose of delusion, though this is fraud on the side of the person who practises the imposition, and can entitle him to no relief. The same law allows to the creditor a lien upon a deposit or commodate in his hands for the recovery of his due from the debtor who so entrusts any article to him; and even permits the practice of trick and artifice, to obtain

The *Gandharva* marriage is the only one of the eight modes for the legalizing of which no forms are necessary*; and it seems that mutual cohabitation, as it implies what the law declares to be alone necessary, namely, "reciprocal amorous agreement," would be sufficient to establish such a marriage, if corroborated by any word or deed on the part of the man†.

The relations with whom it is prohibited to contract matrimony are thus enumerated by *Menu*: "She who is not descended from his *paternal* or *maternal* ancestors within the sixth degree, and who is not *known by her family name to be* of the same primitive stock with his father or *mother*, is eligible by a twice-born man for nuptials and holy union."

Adultery is a criminal, but not a civil offence, and an action for damages preferred by the husband will not lie against the adulterer‡. It is not a sufficient cause for the wife to

possession of such an article with the purpose of retaining it as a pledge.—Colebrooke, *Obl. and Con.* Book ii. §§ 95, and Book iv. §§ 518.

* This form of marriage is declared to be peculiar to the military tribe. May not the indulgence have originated in principles similar to those by which, according both to the civil and English law, soldiers are permitted to make nuncupative wills, and to dispose of their property without those forms which the law requires in other cases?—Bl. *Comm.* vol. i. page 417.

† On this principle the law officers of the Sudder Dewanny Adawlut declared legal a marriage contracted in Cuttack, not very long ago, in a case where the parties had cohabited for some time, and the man signified his intention by placing a garland of flowers round the neck the woman. See also *Elem. Hin. Law, App.* p. 198.

‡ Colebrooke, cited *Elem. Hin. Law, App.* p. 33. So also our Regulations, following the Moohummudan law in this particular, treat the

desert the husband, and there are not many predicaments in which such an act on her part is justifiable. Insanity, impotence, and degradation, are, perhaps, the only circumstances under which her desertion of her husband would not be considered as a punishable offence*. A married woman has no power to contract, and any contract entered into by her, will neither be binding on herself nor on her husband, unless the subject of the contract be her own peculiar property, or unless she have been entrusted with the management of her husband's affairs; or unless the contract may have been requisite to her obtaining the necessities of life†.

offence as a crime against society, and not against the individual, but they require that the husband shall stand forward to prosecute. There is a case cited by the author of the Elem. Hin. Law, (App. p. 34.) in which the *pundits* ruled, that the adulterer was liable for the money expended by the injured husband in contracting a second marriage; but this was considered to be rather an equitable opinion, than founded on any express text of law.

* *Menu*, cited in Digest, vol. ii. page 412.

† Colebrooke, Obl. and Con. Part I. Book ii. §§ 57 and 58.

CHAPTER VI.

OF ADOPTION.



The etymology of the Sanscrit word for a son (*putra*) clearly evinces the necessity by which every Hindu considers himself bound to perpetuate his name. “Since the son (*trayate*) delivers his father from the hell named *put*, he was, therefore, called *putra* by Brahma himself*.” Again : “A son of any description should be anxiously adopted by one who has no male issue, for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name †.” Under this feeling, it was natural to resort to the expedient of adoption. Twelve sorts of sons have accordingly been enumerated by *Menu*. “The son begotten by a man himself in lawful wedlock ; the son of his wife, begotten in the manner before described ; a son given to him ; a son made or adopted ; a son of concealed birth, or whose real father cannot be known ; and a son rejected by his natural parents ; are the six kinsmen and heirs. The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice married woman, a son self-given, and a son by a *Sudra*, are the six kinsmen, but not heirs to *collaterals* ‡.”

* Institutes of *Menu*, Chap. ix. §§ 138.

† *Smriti*, quoted in the *Retnâcara* : or, in the language of Statius, “*Orbitas omni fugienda nisu. Orbitas nullo tumultu fletu.*”

‡ Institutes of *Menu*, Chap. ix. §§ 159 and 160.

In treating of the miscellaneous customs of Greece, the author of the *Antiquities** observes as follows :—" Adopted children were called *παιδεσθεραν* or *εισποιητοι*, and were invested in all the privileges and rights of, and obliged to perform all the duties belonging to, such as were begotten by their fathers : and being thus provided for in another family, they ceased to have any claim of inheritance and kindred in the family which they have left, unless they first renounced their adoption, which the laws of Solon allowed them not to do, except they had first begotten children to bear the name of the person who had adopted them, thus providing against the ruin of families, which would have been extinguished by the ruin of those who were adopted to preserve them. If the adopted person died without children, the inheritance could not be aliened from the family into which they were adopted, but returned to the relations of the persons who had adopted them. The Athenians are by some thought to have forbidden any man to marry after he had adopted a son, without leave from the magistrate ; and there is an instance in Tytzes's *Chiliads* of one Leogoras, who being ill used by Andocides the orator, who was his adopted son, desired leave to marry. However, it is certain that some men married after they had adopted sons ; and if they begot legitimate children, their estates were equally shared between those begotten and adopted."

The whole, or nearly the whole, of the provisions above cited, are strictly applicable to the system of adoption as it prevails among the Hindus at this day. But the renunciation of adoption is a thing unheard of in these provinces, and unsanctioned by law under any circumstances. There is no express text declaring illegal a renunciation of adop-

tion, but at the same time there is not any which can be construed as approaching to a justification of it.

In the present age, two, or at the most three, forms of adoption only are allowed, in these provinces ; and the *Dattaca*, or son given, and the *Critrima*, or son made, are the most common. The latter form obtains only in the province of Mithilá. In strictness, perhaps, adoption in this form should be held to be abrogated, as the filiation of any but a son legally begotten, or given in adoption, is declared obsolete in the present age* ; but agreeably to a text of *Vrihaspati*, immemorial usage legalizes any practice†. Some of the requisite conditions for the adoption of a son are comprized in the following texts of *Menu* :—“ He whom his father or mother‡, with her husband’s assent, gives to another as his son, provided that the donee have no issue, if the boy be of the same class, and affectionately disposed, is considered as a son given, *the gift being confirmed by pouring water.*” “ He is considered as a son made or *adopted*, whom a man takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with the merit of *performing obsequies to his adopter*, and with the sin of omitting them§.” But there are many conditions besides these fundamental ones : and briefly noticing such of the rules as are indisputable, and universally admitted, I shall discuss those which have admitted of doubt ; and endeavour to fix such as are uncertain, by citing the authorities in support of

What forms
at present al-
lowed.

Dattaca form
of adoption,

and *Critrima*
form.

* See general note by Sir W. Jones, appended to his translation of *Menu’s Institutes* ; and the text of the *Aditya Purána*, cited in *Jugannátha’s Digest*, vol. iii. page 272.

† Cited in the *Digest*, vol. ii. page 128.

‡ Section 4. §§ 12.

§ *Institutes of Menu*, Chap. ix. §§ 168 and 169.

each. Regarding this particular branch of the law, there is not much difference in the doctrine of the several schools; the *Dattacachandricā* and *Dattacamimānsā*, the two chief authorities on the subject, being respected by all. The first text above cited is sufficiently explicit as to the persons who possess the right of giving in adoption; and the only exception that has been propounded by the commentators is contained in the *Dattacamimānsā*, which refers to the gift of her son by a widow during a season of calamity; and it has been made a question of doubt, whether a widow, even with the sanction of her husband, is competent to adopt a son; but her competency so to do is established by the prevailing authorities. It has been ruled, however, that in the case of an adoption made by a widow without having obtained the consent of her husband, or in which the adopted son shall not have been delivered over to her by either of his parents, but only by his brother, the adoption is invalid*. It is required that the party adopting† should be destitute of a son, and son's son, and son's grandson‡; that the party

A widow, if in distress, may give her son in adoption.

And may adopt, with sanction of her late husband.

Qualifications of the adopting,

* Case of Taramunee Dibia, v. Deo Narayun Rai, and another, *Sudder Dewanny Adawlut Reports*, vol. iii. page 387. The same principle was recognized in the case of Raja Shumshere Mull, v. Raneer Dilraj Koonwur, vol. ii. page 169.

† It has been doubted by Mr. Sutherland, in his *Synopsis*, whether an unmarried person, that is, one not a *grihi*, or as we would say, bachelor, is competent to adopt; but he inclines to the affirmative of the question (p. 212.) In the *Precedents*, vol. ii. of this work, in the case of adoption No. 1, the *pundits* expressly declared the adoption by such individual to be legal and valid, and there is certainly no authority against it. The same doubt is expressed, and the same conclusion arrived at, with respect to an adoption by a blind, impotent, or lame person.

‡ *Sounaka*, cited in *Dutt. Mim.* It has also been doubted by the author of the *Considerations* (p. 150), whether a man having a grandson by

adopted should neither be the only nor the eldest son*, nor an elder relation, such as the paternal or the maternal uncle†; that he should be of the same tribe as the adopting party‡; that he should not be the son of one whom the adopter could not have married, such as his sister's son or daughter's son. This last rule, however, applies only to the three superior classes, and does not extend to *Sudras* §. It is a rule also, that

and of the adopted party.

Exception in case of *Sudras*.

a daughter can adopt a son; but there is no solid foundation on which such a doubt can rest. It must have originated in the indiscriminate use of the word "grandson" in the English translations, as applicable to the daughter's son as well as to the son's son. Mr. Sutherland, in his Synopsis, page 212, infers, and justly, that if male issue exist who are disqualified by any legal impediment (such as loss of caste) from the performance of exequial rites, the affiliation of a son may legally take place. In the Summary of Hindu Law, p. 48, it is laid down as a rule, that the insanity of a begotten son would not justify adoption by the parent; but to this and other general positions laid down in that work I cannot altogether accede: for instance, it is stated, that the *Poonah Shastrees* do not recognize the necessity that adoption should precede marriage; that a younger brother may be adopted by an elder one; that the youngest son of a family cannot be adopted, &c. &c. for none of which can I find authority; though undoubtedly the whole of these positions may be just when applied to that side of India, as founded on the *lex loci*, or immemorial custom.

* *Fasishtha*, *Dutt. Nir.* and *Menu*, *Ibid.*; but this is an injunction rather against the giving than the receiving an only or elder son in adoption, and the transfer having been once made, it cannot be annulled. This seems but reasonable, considering that the adoption having once been made, the boy *ipso facto* loses all claim to the property of his natural family. See Bombay Reports, case of Huebut Rao, v. Govind Rao, vol. ii. page 75; also *Elem. Hin. Law*, App. p. 82, 83.

† *Dutt. Mim. Sect. 2. §§ 32.* Sudder Dewanny Adawlut Reports, vol. iii. p. 232. *Mit.* on *Inh.* Chap. i. Section 11, p. 12.

‡ *Menu*, Chap. ix. §§ 168.

§ *Nareda*, cited in *Dutt. Nir.*

Widow may adopt, with sanction of kindred, according to some authorities.

A brother's son should be preferred.

But this rule does not invalidate the adoption of a stranger.

when a woman adopts, she should have the consent of her husband; or according to the law laid down in some authorities, the sanction of his kindred*; that where there is a brother's son, he should be selected for adoption in preference to all other individuals; but this is not universally indispensable, so as to invalidate the adoption of a stranger†. *Dattacachandricá*, Section 1. §§ 22. In the case of Ooman Dutt, pauper, appellant, *v. Kunbia Singh*, it was held, that while a brother's son exists, the adoption of any other individual is illegal; and this is undoubtedly consonant to the doctrine contained in the *Dattacamimánsá*, but it is controverted in the *Dattacachandricá*. It would appear, however, that according to the law of Bengal and elsewhere, where the doctrine of the latter authority is chiefly followed, and where the doctrine of "*factum valet*" exists, a brother's son may be superseded in favour of a stranger; and even in Benares, and the places where the *Mimánsa* principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion‡. It may be held, then, that the injunction to adopt one's own *Sapinda*, (a brother's son is the first,) and failing them, to adopt out of one's own *Gotra*, is not essential, so as

* According to the *Vyavahárukoustabha* and *Mayácha*, authorities of the highest repute among the *Mahrattas*, which in this respect follow the doctrine of the *Dattacachandricá*, the sanction of the husband is not requisite; but in this respect the authorities above cited differ from most others. Bom. Rep. vol. i. p. 181, and vol. ii. p. 76 and 456. See also Elem. Hin. Law, Appendix, p. 66, 68, 71.

† *Sudder Dewanny Adawlut Reports*, vol. iii. p. 144.

‡ Colebrooke, cited in Elem. Hin. Law, Appendix, p. 74 and 80.

to invalidate the adoption in the event of departure from the rule. It is lastly requisite, that the adopted son should be initiated in the name and family of the adopting party, with the prescribed form and solemnities*. The adoption being once completed, the son adopted loses all claim to the property of his natural family†, but he is estranged from his own family partially only. For the purposes of marriage, mourning, &c. he is not considered in the light of a stranger, and the prohibited degrees continue in full force as if he had never been removed. His own family have no claim whatever to any property to which he may have succeeded; and in the event of a son so adopted, having succeeded to the property of his adopting father, and leaving no issue, his own father cannot legally claim to inherit from him, but the widow of his adopting father will succeed to the property*. He becomes (with the exception above

Must be initiated in the adopter's family.

Effect of adoption.

His consanguineous relatives are not his heirs.

* For an enumeration of the ceremonies enjoined at an adoption, see Summary Hindu Law, p. 52, and Elements Hindu Law, page 82 *et seq.*; but the exact observance of these ceremonies is not indispensable. Dig. vol. iii. p. 244, and Elem. Hin. Law, App. pp. 101, 106.

† it has been asserted by the author of the Elements of Hindu Law, that a son adopted in the ordinary way, though he cannot marry among his adoptive, yet may one of his natural relations; but I cannot find any authority for this doctrine. He seems to have inferred* from the text of *Parijata*, "Sons given, purchased, and the rest, who are sons of two fathers, may not marry in either family even: as was the case of Singa and Saisira," that adopted sons not bearing the double relationship might do so; but the inference is clearly untenable. Indeed Mr. Sutherland, to whom he refers as his authority, expressly declares in his Synopsis (p. 219), that the adopted son cannot marry any kinswoman related to his father and mother, within the prohibited number of degrees, as his consanguineal relation endures.

* Elem. Hin. Law, Appendix, p. 104.

Exception in
the case of a
Dwyamushaya-

His share
with a son sub-
sequently born,

and with two
or more.

Has all the
rights of a post-
humous son.

noticed) to all intents and purposes a member of the family of his adopting father, and he succeeds to his property, collaterally as well as lineally†; but excepting the case of the peculiar adoption termed *Dwyamushayana*, he is excluded from participating in his natural father's property‡. Where a legitimate son is born subsequently to the adoption, he and the son adopted inherit together; but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doctrine of other schools§. If two legitimate sons are subsequently born, then, according to the Benares school, the property should be made into seven parts, of which the legitimate sons would take six; and according to the law as current elsewhere, into five shares, of which the legitimate sons would take four, and so on, in the same proportion, whatever number of legitimate sons may be born subsequently||.

A boy adopted by a widow with the permission of her late husband has all the rights of a posthumous son, so that a sale made by her to his prejudice of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity¶: and in the case of a

† *Menu*, Chap. ix. §§ 159.

‡ See Precedents of Adoption, case 10, and of Sisters' Sons, &c. case 7. *Vasishtha*, cited in the *Dutt. Mim.* and *Cutyáyana* in the *Dattacachandricá*.

§ See the case of *Srinath Serma, v. Radhakaunt*, and *Dutt Narain Sing and others, v. Roghoobeer Singh*, *Sudder Dewanny Adawlut Reports*, vol. i. pages 15 and 20.

|| It is laid down in the *Dattacachandricá*, that in case of *Sudras*, if a legitimate son be subsequently born, he is entitled to an equal share only with the adopted son; and this rule prevails accordingly in the southern provinces.

¶ Case of *Ranee Kishermanee, v. Oodwunt Singh* and another, *S. D. A. Reports*, vol. iii. p. 220.

Hindu of Bengal, dying in his father's lifetime without issue, but leaving a widow authorized to adopt a son, if such adoption be made by the widow, with the knowledge and consent of her deceased husband's father, at any time before he shall have made any other legal disposition of the property, or a son shall have been born to his daughter in wedlock, no such subsequent disposition or birth shall invalidate the claim of the son so adopted to the inheritance*.

Example.

The above rules relate to a son adopted in the *Dattaca* form. But there is a peculiar species of adoption termed *Dwyamushayuna*, where the adopted son still continues a member of his own family, and partakes of the estate both of his natural and his adopting father, and so inheriting is liable for the debts of each. To this form of adoption the prohibition as to the gift of an only son does not apply†. It may take place either by special agreement that the boy shall continue son of both fathers, when the son adopted is termed *Nitya Dwyamushayuna*; or otherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated *Anitya Dwyamushayuna*; and in this latter case, the connexion between the adopting and the adopted parties endures only during the lifetime of the adopted. His children revert to their natural family‡. With a legitimate son subsequently born, the *Dwyamushayuna* takes half a share of his adopting father's property§.

Dwyamushayuna form of adoption.

Of the *Nitya* form.

and *Anitya*.

His share with a son subsequently born.

The question as to the proper age for adoption has been much discussed; and the most correct opinion seems to be,

* Case of Ramkissen Surkheyl, v. Srimutee Dibia, Ibid. 367. See also Colebrooke, in Elem. Hin. Law, App. p. 102.

† See the case of Raja Shumshere Mull, v. Ranee Dilraj Koonwur, S. D. A. Reports, vol. ii. p. 169.

‡ Dutt. Mim. Sec. 6, §§ 41 and 42.

§ Dutt. Chand. Sec. 5, §§ 33.

Age of adoption.

that there is no defined and universally applicable rule as to the age beyond which adoption cannot take place, so long as the initiatory ceremony of tonsure, according to one opinion, and of investiture, according to another, has not been performed in the family of the natural father.

According to the *Dattacamimānsā*.

In the *Dattacamimānsā*, the period fixed beyond which adoption cannot take place is the age of five years ; and if the ceremony of tonsure have been performed within that period in the family of the natural father, the son adopted cannot become a *Dattaca* in the ordinary form, but must be considered an *Anitya Dwyamushayuna*, or son of two fathers. This can only be effected by the performance of the sacrifice termed *Putreshti*, by which the son is affiliated in both families.

And according to the *Dattacachandrica*.

In the *Dattacachandrica** the period fixed for adoption is extended, with respect to the three superior tribes, to their investiture with the characteristic cords, which ceremony is termed *Oopunayuna*, and is subsequent to that of tonsure, or *Chooracurana* ; and with respect to *Sudras*, to their contracting marriage. But investiture in the one case, and marriage in the other, must be performed in the family of the adopting father. The periods fixed, however, for the investiture of the three superior tribes are different.

* The difference of opinion with respect to this point arises from a difference of grammatical construction. The term in the original is *Chudadya*, (signifying tonsure and the rest,) which is a compound epithet termed *Buhobrihee*, which again is divided into two kinds called *tadguna* and *atatguna*, inclusive and exclusive. According to those who adopt the former construction, adoption is lawful even after tonsure ; but not so according to those who adopt the latter. The former construction is adopted by *Devandabhatta* ; the latter by *Nandapandita*.

That of a Brahmin should take place when he is eight years of age, which may be construed optionally, as signifying eight years from the date of conception, or from the date of birth. That of a *Cshetrya* at eleven years of age, and that of a *Vaisya* at twelve. But there are secondary periods allowed : for instance, the investiture of a Brahmin may be postponed until sixteen years after the date of conception; that of a *Cshetrya* until twenty-two years after the same date; and that of a *Vaisya* until twenty-four years. It should be observed, however, that where this ceremony of *Oopunayana* has once been performed, an insurmountable bar to adoption is thereby immediately created. Its effect cannot, as in the case of tonsure before the age of five years, according to the authority of the *Dattacamimánsá*, be so far neutralized as to admit of its being reperformed after the ceremony of *Putreshti**.

Periods of investiture for the different tribes.

The authorities being entitled to equal weight in different parts of the country, the only ground of preference must be sought for in the different customs prevailing in different places. In the province of Bengal, and in the southern provinces, the more extended period should be assumed as the limit†; that being apparently consonant to

Period of adoption in Bengal and the southern provinces.

* This has been doubted by the translator of the *Dattacachandricá* and *Dattacamimánsá*, in his Synopsis at the conclusion of that work, p. 225; and he diffidently expresses his inability to settle the question, though he inclines to the negative: but independently of there being no authority in support of the affirmative of the question, the fact that investiture constitutes a second birth is conclusive against it. Adoption is permitted on the principle that the adopted son is born again in the family of his adopting father; but this cannot be where the investiture, which causes the second birth, has already been performed in the family of the natural father.

† For the doctrine as to the age of adoption according to the Southern authorities, see *Elements of Hindu Law*, page 75 *et seq.* and Summary ditto, p. 50.

And in Benares.

Reason of the rule.

Precedents cited.

The doctrine of the *Mīmāṃsā* preferred in Benares, and that of the *Chāndricā* elsewhere.

the received practice; while in Benares, the *Dattacamimānsā*, which limits the period of adoption, should for the same reason be followed. In laying this down as a rule, it may be objected, that there do not exist sufficient grounds for the establishment of its accuracy. It is proper, therefore, that the grounds of the rule should be stated. In the precedents which I have collected, there is no case bearing directly on the point. Case 2. (which is a Bengal case) does not expressly prohibit adoption after the age of five years. And in the case of Kerutnarain, *versus* Musst. Bhubinesree, (the only adjudicated one for Bengal that I can find bearing on the question*,) the principle of the extended limit was fully discussed and admitted. The limitation to the age of five years is founded on a passage in the *Calicapurānā*†, and the authenticity of that passage is doubtful. The *Dattachandricā* makes no mention of it, though the *Dattacamimānsā* does. The latter being a Benares authority, it may be proper to apply the limiting principle to that province, but not to Bengal or the Dekhan, where that principle is not only not recognized, but where it is denied, and adoptions continually take place at an age far exceeding five years. There is no standard work on the subject of adoption expressly for the Bengal school; but whenever there is any difference of opinion between the *Dattacamimānsā* and the *Dattachandricā*, the doctrine of the latter conforms to that of Bengal; for instance, as to the share to be taken by an adopted with a legitimate son‡. Other instances might be cited. If it should be considered that the reasons here given are insufficient to warrant the conclusion arrived at, it may at least be contended, that it is open to a Bengal *pundit* to adopt either authority, and that the adoption of that which admits

* Sudder Dewanny Adawlut Reports, vol. i. p. 161.

† Digest, vol. iii. p. 228.

‡ *Dāyabhāga*, 155.

the more extended limit, as being the more liberal construction, could not be objected to. The author of the Considerations on Hindu Law as current in Bengal *, seems adverse to the extension* of the limit. He maintains, that in the case of Gopeemohun Deb, it was the opinion of all the *pundits* who were consulted on his behalf, that proof of his being under the age of five years was indispensable. He also alludes to a remark appended to the case of Kerutnarian, v. Musst. Bhubinesree, decided in the S. D. A. ; but, with respect to the first, it may be observed, that there does not appear to have been any formal opinion actually taken ; and, with respect to the second, it is not apparent from what authority the remark proceeded. The author of the Considerations lays it down as a second rule, that adoption cannot take place in any of the classes after

Argument continued.

the ceremony of tonsure shall have been performed. From what has preceded, it will appear, however, that "investiture" should have been substituted for the word "tonsure ;" and that the doctrine should have been qualified by the provision, that if tonsure had been performed previously to the fifth year, it might be repeated in the family of the adopting father, the adopted son thereby becoming an *Anitya Dwijamushayana*. According to the *Muyoc'ha*, an authority of the greatest eminence among the Mahrattas, the restriction as to age relates only to cases where no relationship subsists ; but when a relation, or *Sagotra*, is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family †. In Mithilá, where the *Critrima* ‡ form of adoption prevails, there is no

Adoption cannot take place after investiture, but may after tonsure under five years.

Among the Mahrattas, no restriction as to age of a relation.

Nor in the *Critrima* form.

* Page 144.

† Bombay Reports, vol. i. p. 195.

‡ This form of adoption is wholly unknown in Bengal : but see note, Sutherland's Synop. p. 221, and case of Ooman Dut, v. Kunhai Singh, Sudder Dewanny Adawlut Reports, vol. iii. p. 144.

According to which form a brother or a father may be adopted; and a *Critrima* does not lose relation to his natural family, but inherits in both.

Adopted by a widow, does not thereby become son of the husband,

and must himself consent to the adoption.

The relation does not descend.

sort of restriction, except as to tribe; it being requisite that the tribe of the adopting father and of the adopted son be the same. There is no limit as to age, and no condition as to the performance of ceremonies*; so much so, that *Keshuba Misra*, in the *Dwaita Purishishta*, treating of this description of adoption, has declared that a man may adopt his own brother†, or even his own father. But he, as well as his issue, continues after the adoption to be considered a member of his natural family‡, and he takes the inheritance both of his own family and that of his adopting father§. Another peculiarity of this species of adoption, is that a person adopted in this form by the widow does not thereby become the adopted son of the husband, even though the adoption should have been permitted by the husband||; and the express consent of the person nominated for the adoption must be obtained during the lifetime of the adopting party¶. This relation of *Kritrima* son extends, as has been already observed, to the contracting parties only; and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting

* See the case of Kullean Singh, c. Kirpa and another, Sudder Dewanny Adawlut Reports, vol. i. p. 9.

† The reverse of this opinion was maintained in the case of Baloo Runjeet Singh, v. Obhye Narain Singh, Sudder Dewanny Adawlut Reports, vol. ii. page 245; but the authorities cited by the law officers in support of the doctrine laid down by them on that occasion had relation to the *Dattaca* form of adoption.

‡ Dig. vol. iii. p. 276.

§ Sudder Dewanny Adawlut Reports, vol. iii. p. 307.

|| Ibid. vol. ii. p. 27.

¶ Ibid. p. 173.

father. He does not inherit collaterally, being ninth in the enumeration, according to *Yājñyavalkya**. Does not inherit collaterally.

It has already been observed, that a man who has a son, son's son, or son's grandson, is not competent to adopt a son; and it would seem to follow, by analogy, that if a man has a son, and the son of an elder son deceased, he may give the former† away in adoption, because he cannot be considered as the father of one son only; the latter also bearing towards him the relation of a son to all intents and purposes, and supplying the place of the elder one. In the *Dattacami-mānsā*, there is a prohibition against the gift of a son, where there are only two; but the precept is merely dissuasive, and not peremptory. A man having a son, and a son's son, may give the former in adoption.

Two persons cannot join in the adoption of one son. A notion seems to have prevailed, that two brothers might adopt the same individual; but this is entirely erroneous‡. The supposition seems to have proceeded on a misconstruction of the following text of *Menu*:—"If among several brothers of the whole blood, one have a son born, *Menu* pronounces them all fathers of a male child by means of that son§". But that text is not meant to authorize the adoption of a nephew even, by two or more brothers. The adopted son of one brother would of course offer up oblations to the ancestors of all, and so far would perform the office of a son to them also; but he would not take the estate of his adopting father's brothers, in the event of their having any nearer heir.

Two persons cannot adopt the same individual under any circumstances.

* Dig. vol. iii. p. 276.

† In this case the dissuasive precept against giving one of two sons would apply, but the adoption would nevertheless be valid.

‡ See Considerations on Hindu Law, p. 473 *et seq.*

§ Cited in Dig. vol. iii. p. 266.

A *Dattaca* son succeeds collaterally, but not to the property of cognates.

Example.

Reason for his not succeeding to cognates property.

Another point which has been the subject of much discussion, is, as to whether an adopted son by the *Dattaca* form succeeds collaterally, as well as lineally; but this may now be fairly said to be set at rest, and decided in the affirmative. It is true that *Jimutavahana*, in the *Dáyabhāga*, has contended that the son adopted in the *Dattaca* form cannot succeed to the property of his adopting father's relations; but the doctrine, being in opposition to the text of *Menu*, cannot be held entitled to any weight*. It should be observed, however, that a son so adopted has no legal claim to the property of a *Bandhu* or cognate relation: for instance, if a woman on whom her father's estate had devolved, adopt a son with the permission of her husband, the son so adopted will not be entitled to such estate, on his adopting mother's death. It will go to her father's brother's son, in default of nearer heirs. This point was determined in a case recently decided by the court of Sudder Dewanny Adawlut†. It is not quite evident why a daughter's adopted son should be excluded from inheriting the estate of his adopting mother's father, while a son's adopted son's right of succeeding collaterally has been acknowledged, in as much as the maternal grandfather is enumerated among the kindred by all the Hindu legislators; but the reason is, that the party adopted in the latter case becomes the son of a person whose lineage is distinct from that of the maternal grandfather.

* This question has been amply discussed in the Considerations on Hindu Law, p. 128 *et seq.* See also case of Shamchunder and Rooderchunder, v. Narayinee Dibia and Ramkishan Rai, Sudder Dewanny Adawlut Reports, vol. i. p. 209.

† See the case of Gunga Mya, v. Kishen Kishore and others, Sudder Dewanny Adawlut Reports, vol. iii. p. 128.

The difference of opinion existing as to whether a *Dattaca* should be considered as heir of the adopter's kinsmen or not, arises from a difference in the order of enumeration in the twelve descriptions of sons ; some legislators maintaining that *Menu* included the *Dattaca* among the first six, who are entitled to inherit collaterally, while others maintain that the same law giver ranked him among the last six, who can only inherit lineally. In the *Dwaita Nirnaya* the several opinions have been noticed, and the author of that work gives his own in favour of the *Dattaca*. In Sir William Jones's translation of the Institutes of *Menu*, the *Dattaca* is ranked among the first six ; and a great majority of the *pundits* throughout the country who were consulted on the subject when it was agitated in the Supreme Court, expressed their opinion, that the *Dattaca* is entitled to inherit collaterally*. The author of the *Dattacachandricá*, according to his usual expedient of reconciling conflicting doctrines, puts the decision of the question on the character of the claimant—a criterion, it must be confessed, not very precise†.

Reason of the difference of opinion as to the *Dattaca's* right of collateral succession.

Authorities cited.

* This question was circulated by the court of Sudder Dewanny Adawlut to all the courts under its jurisdiction, to ascertain the law on the point from their Hindu law officers. See page 161, Considerations on Hindu Law.

† I may here be permitted to introduce the following report of a case decided on the 30th April 1821, tending to establish this point, and as generally connected with the law of adoption. The report was not given with other decisions of the Sudder Dewanny Adawlut of the same year ; and from the importance of the case, it may be concluded that the omission was attributable to oversight.

It is clear, that a man having adopted a boy, and that boy being alive, he cannot adopt another. It is written in the

The appellant in this case was Gourhurree Kubraj, guardian of Sheopershad Chowdree, a minor, against Musst. Rutnasuree Dibia, mother of Kufroona Kant Rai, also a minor.

The suit was originally instituted by the appellant against Kashee Kant Rai, in the Moorshedabad provincial court, on the 14th of March 1814, to recover possession of a three-anna share of the *zemindari*, Pergunnah Tahirpoor, and the independent Kismuts Talgachee, Juggunnathpoor, &c. &c. in *zillah* Rajesaye. The action was laid at Rs. 7051, the estimated annual produce.

The plaint set forth, that Rajah Mohindernarain had five sons, viz. Rāmindernarain, Rubindernarain, Jadubinderanrain, Munneindernarain, and Oopindernarain, of whom Jadubindernarain and the two others last mentioned, died without children. On the death of Mohindernarain, one moiety of the six-anna share in Pergunnah Tahirpoor, which constituted his *zemindari*, descended to Anundindernarain, the adopted son of Ramindernarain and father of Sheopershad, a minor, and the other half to Bhyrubindernarain, as heir to his adopting father Raghoobindernarain, son of Rubindernarain. Anundindernarain Chowdree sold a five-pie share of his three-anna portion, and retained possession of the remaining portion. Bhyrubindernarain died in 1204, B. S. leaving Jugdusuree his wife, and Bunmalee Dibia his daughter. Jugdusuree obtained possession, and was registered as proprietor of her husband's share; and in the year 1212, B. S. gave Bunmalee, when she was nine years old, in marriage to the defendant. Bunmalee died on the 27th of Phagoon 1213, B. S. before she arrived at years of maturity; and Jugdusuree likewise died on the 17th of Cheyt in the same year. As Sheopershad was entitled to perform the *sradha* and to succeed to the property left by Jugdusuree, he presented a petition to the collector to be registered as proprietor of the deceased's estate, which was opposed by the defendant, on the plea that Jugdusuree had made a gift in 1207, B. S. of the *zemindari* and her other property to him and to his wife Bunmalee, to which he was therefore entitled: his claim was also opposed by Eshurchund, a person who represented himself to be the adopted son of the deceased, and who likewise applied for the entry of his own name. The collector rejected Sheopershad's application, and ordered the defendant's name to be entered for Jugdusuree's *zemindari*, according to the con-

Dattacamimānsā: "A man destitute of a son (*aputra*) is one to whom no son has been born, or whose son has died;

ditional deed of gift produced by him, though contrary to the *Shasters*, and referred Sheopershad and Eshurchund to a civil suit. Eshurchund brought an action in the *xillah* court, through his guardian Gungaram Bhaduree, and obtained a decree, which was reversed on appeal by the provincial court, and his claim as adopted son rejected. This decision was subsequently affirmed by the Sudder Dewanny Adawlut, which court passed an order, on the 4th of February 1813, directing Sheopershad to prefer his claim, as heir, either in the *xillah* or provincial court, to the estate left by Jugdusuree, when it would be decided whether the deed of gift produced by Kashee Kant Rai was valid or not, according to the *Shasters*. Bunmalee Dibia was married to Kashee Kant in the year 1212, B. S. and the deed of gift produced by the defendant as having been executed by Jugdusuree in favour of himself (Kashee Kant) and his wife Bunmalee is dated the 23d of Assar 1207, B. S. Jugdusuree was in possession of the estate during her lifetime, namely till Cheyt 1213, B. S. during which period Kashee Kant Rai (who was not competent to perform the exequial rites) had nothing to do with it, and no mention was made of the deed of gift. From the condition specified in the said deed, it appeared that the gift was made to Kashee Kant and Bunmalee Dibia, in the event of the latter becoming pregnant. It was very suspicious, and altogether unlikely that the idea of Bunmalee's pregnancy should have been entertained five years previous to her marriage, and inserted in the deed of gift. The instrument by which Jugdusuree bequeathed her property on her death to the defendant and Musst. Bunmalee is invalid, inasmuch as she is not empowered by the *Shasters* to alienate it by sale or gift, and as, moreover, Bunmalee died during the lifetime of Jugdusuree, her succession was thereby defeated. Besides, by a compromise entered into formerly between Anundindernarain, the father of Sheopershad, and Bhyrubindernarain, the husband of Jugdusuree, it was provided, that the estate and property of either of them who should die without children should go to the survivor and his heirs; so that, in every point of view, Sheopershad was entitled to Jugdusuree's property.

The defendant in answer stated, that after three of the five sons of Rajah Mohindernarain had died without children, Rubindernarain, grandfather of Bhyrubindernarain, the husband of Raneé Jugdusuree, and

for a text of *Sounaka* expresses, “ one to whom no son has been born, or whose son has died, having fasted for a son,

Ramindernarain, grandfather (as alledged by the plaintiff) of Sheopershad, became possessed of the six-anna share of *pergunna* Tahirpoor. A moiety, or three-anna share, devolved at the death of Rubindernarain on Raghooindernarain by the law of inheritance, and on his death it went to Bhyrubindernarain, and on his dying without sons to his widow Musst. Jugdusuree. The remaining three-anna share descended to Anundindernarain, by a gift from Ranee Lukhee, widow of Ramindernarain, and a deed of compromise, alleged to have been executed by Bhyrubindernarain. The property did not go to Anundindernarain by right of adoption; for Ranee Lukhee, after her husband's death, had in conformity to his permission, adopted in the first instance, a person named Roodurnarain, and on his death, Anundindernarain, without the permission of her husband, and in opposition to the *Shasters*, on which account she had made a gift to him of her estate. An adoption of this nature has never been recognized by the *Shasters*, by the usages of the Brahmins or other Hindu tribes. A suit was in consequence instituted in the *zillah* court between Bhyrubindernarain and Anundindernarain, and regularly carried in appeal before the Sudder Dewanny Adawlut. The *vyavaetha* submitted by the Pundit of the *zillah* court, which likewise coincided with five legal opinions filed by Bhyrubindernarain, invalidated the adoption. The *zillah* judge, however, acted on the opinion expressed by other Pundits which were submitted by Anundindernarain, and passed a decree in his favour, declaring in that decree, which was dated June the 30th, 1795, that the object of Ranee Lukhee in executing a deed of gift of that nature, was to secure to Anundindernarain in some way, either by adoption or by gift, the succession to her property, and that, in the event of any dispute arising after her death on the subject of the second adoption, there might be no doubt of her property descending to Anundindernarain under the deed of gift. By the decision of the superior court, the adoption of Anundindernarain was declared illegal, and he was allowed to succeed to the property solely on the ground of the deed of gift and the compromise, the authenticity of which was not ascertained. Besides, even supposing the adoption to have been valid, the person adopted is only entitled to the property of his adopting father, and has no claim to the property of his adopting father's family or collateral relations. Sheopershad, therefore, could have no title whatever to the three-anna share of the estate in dispute. The

&c.*:" but it seems to be admitted, that a man having a legitimate son may not only authorize his wife to adopt a son

A man having a son or an adopted son,

following, he affirmed, was the true state of the case. It is the usage among Brahmins for a *Kooleen*, when he marries into an inferior family, to receive a large valuable consideration. Accordingly, in 1207, B. S. Rane Jugdusuree, wife of Bhyrubindernarain, who was of an inferior family, having agreed to give her daughter Bunmalee Dibia in marriage to him (the defendant), who was of the *Kooleen* caste, made a gift of her *zemindaree* and other property to his wife Bunmalee Dibia and himself, with the knowledge and consent of all her family, as well as of Anundindernarain. But, in consideration of their youth, she executed an *icarnama* in the form of a will, in favour of his (the defendant's) father, Kalee Kant Rai, empowering him to superintend and take care of the estate during the period of their minority, and died in the year 1213, B. S. Anundindernarain also lived till 1212, B. S. subsequent to the execution and registry of the deed of gift; and, had he considered himself the heir of Rane Jugdusuree, he would, undoubtedly, have opposed the proceeding, either at the time or at some subsequent period of his life. He, however, had never done so. On the death of Ranee Jugdusuree, Gungaram Bhaduree, the plaintiff's uncle, having persuaded Benoud Ram Rai, proprietor of a ten-anna share in the above *pergunna*, to collude with them, forged an *ijazutnama*, or deed of permission to adopt, and a *hibbanama* and other documents, and sued him (the defendant), first stating that Eshurchunder was the adopted son of the Rane: but their claim was rejected, and, therefore, the present suit (fraudulently preferred on the ground that Sheopershad was the heir, and

* Page 2.—There is a *vyavastha* maintaining the opposite doctrine, the authority cited for which is a verse ascribed to *Menu*, though not to be found in the *Institutes*: "Many sons are to be desired, that some one of them may travel to Gya." But this text obviously relates to legitimate sons. See the case of Goureepershad Rai, v. Jymala, p. 136, vol. i. *Sudder Dewanny Adawlut Reports*. And Mr. Colebrooke observes, in a note to p. 42, *Ibid.* that the validity of a second adoption, while another son, whether by birth or adoption, is living, is a question on which writers of eminence have disagreed; that *Jagan-nitha*, in his *Digest*, inclines to hold it valid; but that the author of the *Duttacamimánsá*, a work of great authority, maintains the contrary opinion.

may authorize his wife to adopt another, after his death, failing such legitimate son, but also, failing the son so adopted, to adopt another in his stead*; and it has

entitled to the property alienated by the gift of the Ranee) was altogether inadmissible ; inasmuch as the illegality of Anundindernarain's adoption invalidated the claim of Sheopershad to the property of Ranee Jugdusuree ; and the Ranee having, before the birth of Sheopershad, made a gift of her property to him (the defendant) and to his wife, it could not be considered as her estate on her death. Besides, he had himself, with his own money, paid off a mortgage contracted on the estate since the time of Bhyrubindernarain, when it would otherwise have been sold. The forgery of the deed of compromise produced by the plaintiff was evident, from the circumstance of its being dated on the 11th of Bhadoon 1212, B. S. The suit about the adoption of Anundindernarain, pending between him and Bhyrubindernarain, his (the defendant's) father-in-law, was decided in the Rajshahee *zillah* court on the 13th of Assarh in the above year, afterwards in the provincial court, and lastly in the Sudder Dewanny Adawlut on the 4th of Assin 1208, B. S. Had the deed of compromise been genuine, and in the possession of Anundindernarain, he would undoubtedly have brought it forward in some court of justice. And as the cause between Anundindernarain and Bhyrubindernarain was pending till 1208, B. S. it was extremely improbable that a compromise should have been entered into in 1202, B. S. Anundindernarain also was a minor at that time, and many suits had been preferred in the civil and criminal court and in the collector's office relative to the estate between 1202 and 1213, B. S. a period of twelve years, during which Ranee Jugdusuree was alive ; but no mention had ever been made of the compromise, nor had it ever been registered, or before produced.

On the death of the defendant, his wife, Musst. Rutnusuree Dibia, mother of Kuronah Kant Rai, his minor son, became his representative in the suit.

* Case of Shamchunder and Rooderchunder, p. 209, vol. i. Sudder Dewanny Adawlut Reports, where it was established, that there may be two successive adoptions by the widows of the same man ; and the case of Musst. Solukhna, v. Ramdolal Pande and others, p. 324. vol. i.

also been ruled, that authority to a wife to adopt, in the event of a disagreement between her and a son of the husband, failing such son.

The plaintiff, in replication, maintained that Ramindernarain, grandfather of the minor Sheopershad, and his brother Rubindernarain, lived together as members of an undivided family. Rubindernarain died leaving a son, Raghooinderarain, his heir; and Ramindernarain died leaving his widow, Musst. Lukhee Ishuree, to whom he granted permission to adopt a son. In Kartik 1170, B. S. Raghooinderarain died leaving a widow, Musst. Sirsuttee, who with Lukhee Ishuree, the grandmother of the minor Sheopershad, enjoyed joint possession of the estate. Musst Sirsuttee adopted Bhyrubindernarain, entered his name jointly with that of Lukhee Ishuree in the collector's office, and died in 1162, B. S.; and the grandmother of Sheopershad died after having adopted Anundindernarain according to her husband's permission, put him in possession of the estate during her own lifetime, and by means of an application effected the registry of his name instead of her own. Bhyrubindernarain afterwards instituted an action, on the ground that the adoption of Anundindernarain was illegal. By the decisions, however, of the *zillah* and provincial courts and of the Sudder Dewanny Adawlut, the adoption of Anundindernarain was held to be valid, and a decree passed in his favour. There could, therefore, be no doubt of Sheopershad's title, and of his being the *Pindadhikar*, or person entitled to perform the exequial rites of Jugdusuree and Bhyrubindernarain. As Kalee Kant Rai, father of Kashee Kant, the defendant, was adopted by Kishen Kant Rai, and according to the *Shasters* the distinction of the *Kooleen* caste is lost on the adoption, and as the dignity of the ancestors of Mohindernarain (who were Rajahs) was superior, the allegations of the defendant relative to Jugdusuree having given her property to him on his marriage with her daughter, in consideration of his rank, were evidently false, inasmuch as from the time of the ancestors of Mohindernarain, Ramindernarain, and Anundindernarain, connexions had subsisted between them and the *Kooleen* Brahmins. No one ever gave his whole estate to his daughter and son-in-law; but it is both the law and usage, that if a person dies without male issue, his estate will not devolve to his daughters, or daughters' sons, but only to the descendants from the same grandfather. In accordance with this custom, on the death of Indernarain Rai without male issue, his estate did not go to Ramsingh, his daughter's son, who was alive, but to the persons descended from the same grandfather as himself. The truth of all

then living, will not avail; though authority to adopt, in the event of that son's death, would be valid*. It is a disputed

these representations will be established on inquiry. If the father of Sheopershad had been aware of the gift alleged by the defendant, he would certainly have opposed it. It is singular that the deed of gift declares, that the gift is made for the performance of exequial ceremonies, and stipulates that Ranee Jugdusuree shall, during her lifetime, retain possession of the above estate, and have the power of alienation by sale or gift. As, therefore, the Ranee enjoyed possession of the estate, and retained the power of disposing of it by gift or sale; and did, subsequently to the execution of the deed of gift, give, in the exercise of her proprietary right, *devotter* and *bruhmoter* lands to many persons, and the donee did not obtain possession of the lands given to him, it did not clearly appear with what view the will in favour of the defendant's father was executed, or what law legalized a conditional gift of the above nature, or how, Bunmalee Dibia having died childless in the lifetime of her mother, the condition relative to the performance of exequial ceremonies could hold good.

The rejoinder of Rutnusuree Dibia set forth, that as both the donor and the donee were dead, and the property given had descended as an hereditary estate, the claim of any person thereto was inadmissible according to the *Shasters*; and that her son, as the *Pindadhikar* of Bunmalee Dibia, was undoubtedly entitled to her property.

On the 13th of June 1817, the second judge of the provincial court dismissed the claim with costs, on the ground of the *vyavastha* submitted by the *pundit* of the court, which declared that an adopted son was entitled to the property of his adopting father, not to that of his adopting father's collateral relations; that a woman had not the power to adopt a second person on the death of an individual whom she had previously adopted, with her husband's permission; and that, therefore, Anundindernarain, and consequently Sheopershad, were not entitled to the property in dispute; and that the deed of gift executed by Jugdusuree in favour of Bunmalee Dibia and Kashee Kant, her daughter and son-in-law, was valid.

* Case of Musst. Soolukhna, v. Randoolal Pande and others, vol. i. p. 325.

point, whether a widow having with the sanction of her husband, adopted one son, and such son dying, she is at liberty

But whether she can without such sanction, is disputed.

The appellant being dissatisfied with this decision, appealed to the court of Sudder Dewanny Adawlut, laying his claim at Rs. 15,151, three times the *sudder jumma* of the lands in dispute.

Eshurchunder Rai, the person claiming to have been adopted by Rane Jugdusuree, presented a petition to the following effect.

“ The suit instituted by Gungaram Bhaduree, your petitioner’s guardian, against Kashee Kant, to effect the reversal of the acting collector’s order for the registry of Kashee Kant’s name as proprietor of a three-anna share in *zemindaree* Pergunnah Tahirpoor, was decreed by the judge of *zillah* Rajshahye. This decision was, however, reversed in the provincial court, and the order of the provincial court was affirmed on the 4th of February 1813, by W. E. Rees, Esq. formerly acting judge of the Sudder Dewanny Adawlut. On your petitioner making frequent applications for redress to the former judges of this Court, he was informed by Mr. Harington, that when the cause of Sheopershad Chowdree came before the court, they would take into consideration your petitioner’s case, and decide upon it. As your petitioner’s adoption is established by the papers in the case of Sheopershad, v. Kashee Kant, (No. 1779.) your petitioner hopes, that when the above cause comes before you, you will take into consideration the present petition, and the papers filed on the former trial, as well as the petitions for a review, and the *vyavasthas* of the *pundits* of this court filed in the cause of Rane Siromunee and others, and afford him redress.”

The case having been brought to a hearing before the second judge, (C. Smith,) all the pleadings and exhibits of the parties were perused, as well as two petitions presented by Eshurchunder Surma, two *vyavasthas* of the *pundits* of this Court, one in the case of Bijia Dibia appellant, v. Unnapoorna Dibia, respondent, the other in the case of Shamchunder Chowdree, and Rooder Chunder Chowdree, appellants, v. Narainee Dibia Chowdrain and Ramkishore Rai, respondents, and the interrogatories of this court to the *pundits* aforesaid; the papers of the Rajshahye *zillah* court, the provincial court, and the Sudder Dewanny Adawlut in cause, (No. 846,) of Gungaram Bhaduree, guardian of Eshurchunder Surma, appellant, v. Kashee Kant Rai, respondent, and the decrees passed by all those three courts therein. Copies of two *vyavasthas* of the *pundits* of this court filed by the ap-

to adopt another without having received conditional permission to that effect from her husband. According to the doc-

pellant's *vakeel*, and the proceedings in three different suits, viz. Bijia Dibia, appellant, v. Unnapoorna Dibia, respondent ; Sohun Lal Khan, appellant, v. Ranee Siromunee, respondent ; and Eshurchunder Paul and others, appellants, v. Kishen Govind Sein, respondent.

The *vyavastha* of the *pundits* in the case of Shamchunder and Rooderchunder, delivered on the 21st of August 1807, was to the following effect.

Q. Subsequently to the death of Kishen Kishore, his senior widow had adopted Nundkishore as a son, and, on the death of the son so adopted, the second widow of the said Kishenkishore adopted an individual called Ramkishore, who is still living : under these circumstances, Joogulkishore, a person adopted by Kishengopaul, the uterine brother of Kishenkishore, and his half brother Luchminarain's two sons, Shamchunder and Rooderchunder, claim the property left by Nundkishore and Kishenkishore : Now supposing the adoption of both the sons to have been proved, in this case, which of the claimants is or are entitled to inherit the property of Kishenkishore and Nundkishore ? and does an adopted son succeed collaterally as well as lineally ?

R. The property, whether consisting of moveables or immoveables, belonging to Kishenkishore, deceased, who left no issue of the body, will devolve on the son whom his younger widow had adopted according to the mode prescribed by law. The uterine son adopted by Kishenkishore's brother and his half brother's sons have no right of succession. The property of the deceased Nundkishore, in default of issue of his adopting mother, will devolve on the adopted son of his step-mother whom she adopted with her husband's sanction, provided he be endued with the requisite qualities, and able to benefit his parents by performing the (*Nitya*) indispensable and fixed observances, (*Nimittika*) casual rites, (*Camya*) supererogatory works (which are performed at pleasure, or through the desire of some advantage), (*Eesta*) essential ceremonies, as ablution, investiture, &c. (*Poortta*) acts of pious liberality, as digging a well, planting a grove, building a temple, &c. and so forth, prescribed to his own tribe. In this case, the surviving adopted son (of the second widow) being a nearer *sapinda* to the deceased son adopted (by the eldest widow) than the other relations who claim, he will succeed exclusively to the property, and the kinsmen will have no

trine of the *Dattacaminánsa*, the act would clearly be illegal; but *Jagannátha* holds that the second adoption in such

Doctrine of
Jagannátha.

claim. This opinion is consonant to the doctrine of *Menu*, *Goutama*, and *Boudháyana*, the first of whom holds the first rank among legislators; and the doctrine is also consonant to the *Munwartha Mooktavali*, *Dattacaminánsa*, *Vivádabhangárnava*, *Ratnácara*, and other authorities.

Authorities.—The text of *Devala* cited in the *Dayatata* and other tracts: “All these sons are pronounced heirs of a man who has no legitimate issue by himself begotten.” The passage of *Yágyavalkya* cited in the *Dayatata* and other law books: “The wife and the daughters, also both parents, brothers likewise.”

“Of him who leaves no son, the father shall take the inheritance, or the brothers.” *Menu*. The text of *Vrihaspati* cited by *Raghunandana* and others:—“*Menu* holds the first rank among legislators, because he has expressed in his code the whole sense of the *Vedas*: no code is approved which contradicts the sense of any law promulgated by *Menu*.” The texts of *Menu* laid down in the *Ratnácara* and other tracts:—“Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs.” “*Menu*, sprung from the self-existent *Brahma*, and first of the fourteen *Menus*; among these twelve sons of men whom he has named, the first six are pronounced kinsmen and heirs to collaterals: the result is, that, as kinsmen, they offer the funeral cake and water to *Sapindas* and *Samanodacas*, and, as heirs, they succeed to the heritage of their collateral relations, on failure of male issue, as well as to the estate of their father.” This is the explanation of *Cullacabhutta*. The following texts are laid down in the *Ratnácara* and other tracts. *Gautama*. “The son begotten by a man himself in lawful wedlock, the son of a wife begotten by an appointed kinsman, a son given, a son made by adoption, a son of concealed birth, and one rejected by his natural parents, are sons who inherit property. The son of an unmarried girl, the son of a pregnant bride, a son by a twice-married

case would be valid, the object of the first having been defeated. According to the authorities which are followed in Bengal.

woman, the son of an appointed daughter, a son self-given, and a son bought, claim the family of their adopting fathers."

Boudháyana :—Participation of wealth belongs to the son begotten by a man himself in lawful wedlock, the son of his appointed daughter, the son begotten on his wife by a kinsman legally appointed, a son given, a son made by adoption, a son of concealed birth, and a son rejected by his natural parents. Consanguinity, denoted by a common family appellation, belongs to the son of an unmarried girl, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son of a priest by a *Sudra*." Although *Jimutavahana*, *Raghunandana*, and others, explaining the text of *Devula* cited in the *Dáyabhága*, has not reconciled the dispute in regard to the given son and the rest being heirs to collaterals or otherwise, yet it should not be therefore supposed that the given son has no right of collateral succession. The difference of opinion may be reconciled by referring to the distinction of the adopted son being (*Sugoona*) endued with good qualities, or (*Nirgoona*) not so endued. This is the doctrine contained in the *Ratnácara* and other authorities; and it must be admitted that the given son and the rest who are endued with good qualities, are entitled to succeed both to the adopting father and his kinsmen.

"It is also proper to affirm, as intended by that expression, that sons given and others, being virtuous, are entitled to the inheritance and so forth, in preference to a son by a twice-married woman or the like, if he be destitute of good qualities; but if all be destitute of good qualities, he who is superior as nearest allied by birth, shall take a full share of the paternal estate, and the rest shall have the portions allotted to them in the *Brahmapurana* and other works. The maintenance directed must consist in the receipt of such a share; else the seeming contradictions in the texts of *Menu* and others, and of *Yājñyavalkya* and the rest, could not be well reconciled. But some argue, from the concurrent import of the text of *Devula*, that the text of the *Brahmapurana* also relates to sons given and the rest, who are inferior in class to their adoptive fathers.—*Vivádabhangárnava*..

The *vyavasthá* in the case of *Bijia Dibia* against *Unnapurna Dibia*, was to the following effect.

gal and Benares, a woman is competent, after the death of her husband, to adopt a son, provided he gave her permission

And Benares-

Q. Tarnee Choudhrain having, at her husband's death, taken possession of his entire property, real and personal, selected for adoption a boy named Kalikant, with her late husband's sanction. It appears from the deposition of a witness Bhowanishunker, adduced by Kalibhairub and the said Tarnee (who were defendants in this cause) that Kalikant died previously to the celebration of the ceremonies prescribed for adoption ; but it appears from the statement of the plaintiff Bijia Dibia, that the boy died subsequently to his adoption. A few years after his death, the said Tarnee assigned over all the property which she held in her possession to her junior daughter's son (Kalibhairub), while her senior daughter was living and had a daughter. Subsequently the senior daughter was delivered of a son, who laid claim to a moiety of the property disposed of as above stated. Under these circumstances, was the said Tarnee, according to the law of Bengal, competent to give away all her husband's property to her daughter's son, while she had another daughter living, and is the deed of gift in such case valid and binding? Supposing the adoption of Kalikant to have been actually made in this case, was she (the said Tarnee) competent, after the death of such adopted son, to dispose of her adopted son's property by deed of gift in favour of her daughter's son?

R. A widow, without sanction of her husband's representatives, is incompetent to make a gift of his property which had devolved on her by right of inheritance, and the deed of gift which she made cannot be considered as valid or binding. No adopting woman is allowed to dispose of her adopted son's property which had devolved on her at his death, by a deed of gift in favour of one heir, while there is a possibility of the birth of another. This opinion is conformable to the *Dāyabhāga*, *Dāyanirnaya*, *Dāyaruhasya*, *Vyavasthārnuva*, *Dāyatatwa*, *Dāyanirnaya*, and other authorities current in Bengal.

Authorities.—"But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it." Thus *Catyayana* says: "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." "Abiding with her venerable protector:" that is, with her father-in-law, or others of her husband's family, let her enjoy her hus-

And western provinces. to do so during his lifetime ; and, according to the law of the western provinces, with the sanction of the husband's

band's estate during her life ; and not, as with her separate property, make a gift, mortgage, or sale of it at her pleasure. The *Dáyabhága*. It is laid down in the *Dáyanirnaya*, that “ no widow is competent to make a gift, or mortgage, or sale of her husband's property, except for the sake of performing his exequial rites, or other necessary purpose ; and she residing with her husband's family, is entitled to consume only such portion of his estate as may suffice for her subsistence.

For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth. The *Bharata*. By the word “ waste ” it is meant, that a woman cannot make a gift, sale, or other alienation of her husband's property at her pleasure. The *Dáyaruhasya*.

“ The property of a person dying, leaving neither son, son's son, nor son's grandson, goes to his virtuous widow ; but she cannot make any alienation, as sale or the like, of such property, excepting for the purpose of promoting her husband's spiritual benefit by giving a part of it, or for the purpose of saving her own life.” The *Vyavastharuvá*.

The text of *Náreda* laid down in the *Dáyarahasya* :—“ Every sort of contract made by a woman, not in a time of distress, is null and void, particularly the gift, mortgage, and sale of the house and field.”

The word “ wife ” is employed as a term of general import : and implies, that the rule must be understood as applicable generally to the case of a woman's succession by inheritance. The *Dáyabhága*.

The following passage is cited in the *Dáyabhága* and *Dáyarahasya* :—“ They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support ; and the dissipation of their hereditary maintenance is censured.”

The second judge recorded his opinion on the 2d of January, 1821, in these terms :—

“ I am of opinion that neither of the parties in the present case are entitled to the property left by Rancee Jugdusuree, in as much as it has been established that Eshurchunder Chowdree, the appellant in the cause (No. 846.), is the rightful heir. The proofs in favour of

kindred, after his death ; these authorities contending, that although a woman cannot of herself perform the ceremonies

Reason of
the doctrine.

such a conclusion are fully detailed in my proceeding of this date. If, in concurrence with me, the Court, after admitting a review of judgment in case No. 846, reverse the decisions of this Court, and of the provincial court, and affirm the decree of the Rajshahye *zillah* court, it will be necessary to affirm the decree passed by the Moorshedabad provincial court in this case. If, however, on the contrary, they uphold the decree passed by this Court on the 4th of February, 1813, I consider the title of Sheopershad Chowdree (the appellant) to be, according to the *Shasters*, undoubtedly superior to that of Kasheekant Rai, the respondent's father. For Kasheekant Rai only stood in the relation of a son-in-law, which ceased on his wife's dying without children during her mother's lifetime, and his claim under the conditional deed of gift is altogether inadmissible according to the law of inheritance ; inasmuch as the condition was cancelled by the death of the person on whom the fulfilment was enjoined, and on failure of Rancee Jugdusuree's own and adopted children, Sheopershad Chowdree, the appellant, appears the only person who has any title to succeed as heir." Under these circumstances, the second judge recorded his opinion, that the Court should either admit a review of judgment in Eshurchunder Chowdree's case, reversing the decrees of this, and of the provincial court, and affirming the decree of the Rajshahye *zillah* court, dated July the 12th, 1808, and uphold the decision of the first judge of the Moorshedabad provincial court, dated June 13th, 1817, dismissing Sheopershad's claim, and making the costs of all courts payable by the parties respectively ; or that they should reject the application for a review in case No. 846, and, affirming this Court's decree dated the 4th of February 1813, should reverse the decision of the first judge of the Moorshedabad provincial court, and award to Sheopershad Chowdree a three-anna share of *zemindaree pergunnah* Tahirpoor, with mesne profits for the period during which it had been in the possession of Kasheekant Rai, charging the costs of both courts to the respondent.

The case was next brought before the third and officiating judges, (S. T. Goad and W. Dorin.) Their proceeding of the 8th of February was to the following effect.

" It appears that the appellant lays claim to a three-anna share in the *zemindaree of pergunnah* Tahirpore, which was in the possession of Rancee

requisite to adoption, yet that there is no objection to her calling in the assistance of learned Brahmins, as is practised

Jugdusuree, who died in 1213 B. S. The Ranee was seized of the three-anna portion in dispute on the death of her husband Bhyrubindernarain in the year 1204 B. S. who left no male issue and only one daughter. The daughter also died at the age of nine or ten years, after her marriage with the late Kasheekant Rai, the respondent's husband. The appellant maintains, that the share in dispute, being the estate left by Bhyrubindernarain the husband of Jugdusuree, descends to his heir; and as he is the son of Anundindernarain, Bhyrubindernarain's uncle, who was adopted by Ranee Sirsuttee, and was likewise the second adopted son of Ranee Lukhee, he is entitled to it according to the law of inheritance. The respondent contends, that Ranee Jugdusuree transferred the above estate to her daughter and the husband of that daughter by a deed of gift executed on the 23d of Assarh 1207 B. S. under the expectation that her daughter would bear a son, and stipulating that she (the donor) should remain in possession of the lands during her lifetime, as she accordingly did for six or seven years, and she opposes the claim preferred on the grounds of hereditary right by the appellant.

1st. Because the adoption of Anundindernarain by Ranee Lukhee, the wife of Ramindernarain, had not taken place according to the *Shasters*.

2d. Because, even if the adoption of Anundindernarain had been legal, the appellant's claim to succeed as heir to the estate of Bhyrubindernarain and Ranee Jugdusuree was inadmissible according to the *Shasters*, inasmuch as he could not claim relationship with the husband of Ranee Jugdusuree through the adoption of his father.

But with respect to the objections urged by the respondent to the legality of Anundindernarain's adoption by Ranee Lukhee, in conformity to the permission of her husband, it is only necessary to state that Anundindernarain died in 1212, B. S., till which time he was in possession of his adopting father's estate, and that it appears from a decree passed by this Court on the 28th of September 1801, in the case of Ranee Jugdusuree, appellant, v. Anundindernarain, a minor, respondent, that several objections raised to the adoption of Anundindernarain were overruled at the time by this Court, and the adoption declared to be valid. Bhyrubindernarain, moreover, the husband of the appellant upon that occasion, admitted the legality of the adoption. Adverting

by *Sudras* on similar occasions. But according to the doctrine of *Vachespati*, whose authority is recognized in Mithi- Doctrine of
the Mithilá
school.

to the foregoing circumstances, the Court do not consider that the respondent is authorized, after so great a lapse of time, now to call in question the legality of Anundernarain's adoption. And as it is evident, from several former *vyavasthás*, that the deed of gift executed by Ranee Jugdusuree for her husband's estate, to the possession of which she had succeeded on his dying without male issue, is perfectly invalid, it only remains to ascertain whether now the appellant is, according to the Hindu law, entitled to the estate in dispute as heir."

A copy of this proceeding was accordingly ordered to be laid before the *pundits* of the Court, together with the genealogical table furnished by the appellant, to enable them, after a due consideration of their contents, to submit within a fortnight a *vyavasthá* consonant to the Hindu law as current in Bengal, in reply to the following question.

Q. If the deed of gift produced by the respondent be illegal, and at the death of Jugdusuree her husband's heirs had the right of succeeding her, in this case, is the appellant, according to the law of Bengal, entitled to the property in question by right of representation or otherwise?

R. Although Bhyrubindernarain should have died leaving no issue but a daughter, and his property should have been enjoyed by his widow Jugdusuree during her life, and the deed of gift (produced by the respondent) of all her property in favour of her daughter and her husband be illegal, yet on her demise, her property, even though it be subject to the succession of her husband's heirs, will not devolve on the appellant; for he cannot claim it by right of representation, as he being the son of Anundindernarain, the second adopted son of Lukhee Dibin, does not hold the rank of *Sapinda*. A person according to law may desire his wife to adopt his son, but neither by law nor custom can he direct her to adopt one, and after his death another. The second adoption by the widow must be considered as illegal, and the adopted son cannot thereby rank in the relation of a *Sapinda*; and it follows, *a fortiori*, that the appellant has no tie of relationship with the deceased, when his father is debarred from that right. It appears in the question, that Bhyrubindernarain acknowledged the adoption of Anundindernarain; and the Court, having rejected the objections expressed on the sub-

lá, a woman cannot, even with the previously obtained sanction of her husband, adopt a son after his death, in the *Dat-*

ject, admitted the adoption to be good and legal. The ruling authority is independent, and may act according to its pleasure ; but according to law, the second adopted son can be entitled to inherit the property of the individual only by whom he is adopted, and cannot inherit the property of his adopting parent's *Sapindas*. This opinion is consonant to the *Dattacamimsá*, *Dattacachandricá*, *Vyavaháramátricá*, and other authorities, as current in Bengal.

Authorities.—The texts laid down in the above authorities : “ By a man destitute of a son only, must a substitute for the same always be adopted : with some one recourse (*Yasmattasmat Prayatnatus*) for the sake of the funeral cake, water, and solemn rites.” “ The funeral cake :” the “ *Sradha*, or funeral repast.” “ Water :” that is, the presenting water in the two united palms, and so forth. “ Solemn rites :” meaning rites in honour of the deceased, cremation and the like. These are the cause (*hetu*.) The reason, occasioning the adoption, is the cause. This, from being used in the singular number, shews that these ceremonies collectively are the cause, and not individually ; and consequently, the meaning is, that there is not a distinct affiliation, severally for each ; but one adoption only, on account of the whole : for, on default of a son, the failure of the oblation of food and other rites is the consequence.” The *Dattacamimsá*.

As, in their proceeding of the 8th of February 1821, the Court did not require the *pundits* to give an opinion as to the legality or illegality of the adoption of Anundindernarain, they were directed to refrain from all consideration of the merits of that question ; and taking for granted that it was legal, and that Anundindernarain was the adopted son of Ranee Lukhee, wife of Ramindernarain, to submit, within three days, a specific answer to the question proposed in the proceeding of the above date. It was added, that the Court would again take into consideration what was stated in their former *vyavasthá* relative to the adoption of Anundindernarain, after their delivery of the second *vyavasthá*. On the 21st of March 1821, the required reply was submitted, and was to the following effect.

“ Supposing the Court to determine that the adoption of Anundindernarain by Ranee Lukhee, the widow of Ramindernarain, was valid, yet,

taca form; and to this prohibitory rule may be traced the origin of the practice of adopting in the *Critrima* form,

as it was a second adoption, he (Anundindernarain) could not be considered a *Sapinda* of Bhyrubindernarain, nor *a fortiori* could his son Sheopershad be considered a *Sapinda* of the said Bhyrubindernarain. Therefore, if, after the death of Ranees Jugdusuree, the widow of Bhyrubindernarain, the property which had devolved on her is to descend to her husband's heirs, Sheopershad cannot have any right of succession."

As it appeared that the *pundits* had still not given an explicit reply to the question propounded by the Court in their proceeding of the 8th of February, they were directed to give their opinion *de novo*, taking for granted that the adoption of Anundindernarain was valid and unobjectionable in every respect, and as if Anundindernarain were the sole adopted son of his adopting father; and the following was the purport of the third *vyavasthá*, submitted on the 3d of April 1821: That if Anundindernarain was the sole adopted son of his adopting father, and there was otherwise no question as to the legality of his adoption, in such case he must be considered as a member of the *Gotra* of his adopting father, and legally entitled to the property of his adopting father's *Sapindas*; and in the event of there being no nearer *Sapinda* to Bhyrubindernarain than the appellant Sheopershad, in such case the said appellant must be considered entitled to the estate. The *pundits'* opinion proceeded in the following manner:—This opinion is conformable to *Menu*, although the Court directed that our *vyavasthá* should be delivered according to the law of Bengal; and of all the authorities, the *Dáya-bhága* is there most prevalent: and, although it is the opinion of *Jimutavahana*, quoting the text of *Devala*, and adopting his order of enumeration, that the son affiliated in the *Dattaca* form is not an heir of collateral relations (*Sapindas*, &c.), nevertheless, as many *vyavasthás* have been delivered in the Court establishing the adopted son's collateral succession according to the law promulgated by *Menu*, this opinion is delivered according to the same law.

Authorities.—Menu: "Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, *except to their own father*, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son reject-

Critrima form. which is there prevalent. This form requires no ceremony to complete it, and is instantaneously perfected by the offer

ed by his natural parents, are the six kinsmen and heirs." Commentary on the text of *Menu* by *Bakambhatta*: "*Menu*, sprung from the self-existent *Brahma*, and first of the fourteen *Menus*; among those twelve sons of men whom he has named, the first six are pronounced kinsmen and heirs to collaterals: the result is, as kinsmen, they offer the funeral cake and water to *Sapindas* and *Samanodacas*; and as heirs, they succeed to the heritage of their collateral relations, on failure of male issue." The text of *Menu* laid down in the *Dáyabhága*, *Dáyatatva*, *Dáyacramasangraha*, and other authorities: "To the nearest kinsman (*Sapinda*) the inheritance next belongs."

On the receipt of the above *vyavasthá*, the Court observed, that from this *vyavasthá* it appeared, that in consequence of the death of Ranee Jugdusuree, widow of Bhyrubindernarain, without male issue, in 1213 B. S. her husband's estate, which had been enjoyed by her during her lifetime, would descend to her husband's nearest heir; and, supposing Anundindernarain to have been the adopted son of Ramindernarain and Ranee Lukhee, and a member of the family, that Sheopershad, the original plaintiff in the present cause, would succeed hereditarily as a *Sapinda*. In concurrence, therefore, with the opinion expressed by the second judge, they passed a decree in favour of the appellant's claim, reversing the judgment of the Moorsshedabad provincial court, and making the costs of both courts payable by the respondent. By the decree, possession of the three-anna share in dispute was awarded to the appellant, with mesne profits from the date on which the suit was instituted till put in possession. The following observations were introduced into the final decree.

It must be remembered that the proceeding of this Court under date the 8th of February last, declared the respondent disqualified to call in question on the present occasion the legality of the adoption of Anundindernarain, the appellant's father, inasmuch as the legality of that transaction had been admitted, and recognized by a decree passed by the Sudder Dewanny Adawlut on the 28th of September, 1801, (which corresponds with 1208, B. S.) in the case of Ranee Jugdusuree, appellant, v. Anundindernarain, respondent. It appears, moreover, that Anundindernarain was adopted in 1200, B. S. by Ranee Lukhee, and enjoyed possession of his adoptive father's estate till his own death in 1212, B. S. when he was succeeded by his son, who, as heir, continued

of the adopting, and the consent of the adopted party. It is natural for every man to expect an heir, so long as he has

in possession till the institution of the present suit in 1220, B. S. The same objection now urged to the adoption was preferred on the former trial, viz. that the adoption, by the wife of any *zemindar*, of a second son, after the death of a previously adopted individual, was invalid. Two of the soundest and most learned *pundits* of the day, however, viz. those of the Tirhoot and Nuddea *xillah* courts, who were called on to submit their opinions on the subject, pronounced, in concurrence with the *pundit* of the Rajshahye *xillah* court, the adoption to have been a legal transaction; and as the former judges of this Court in 1801, by their decree admitted and decided on the legality of Anundindernarain's adoption in the face of the alleged objection, the Court was of opinion that the above-mentioned decree, and the long lapse of time, does not leave the question of law open to their investigation. From the former decree of this Court, the grounds on which the judgment pronounced on that occasion was formed cannot be ascertained. But it is doubtful whether the former Court considered the adoption of Anundindernarain as a second adoption effected by Ranee Lukhee without permission from her husband, and legalized it proceeding on the *Ijazutnama* obtained by her from her husband, although it specified no permission for adopting a second person, or construing the tenor of the *Ijazutnama* to imply a tacit consent to the adoption of a second, on the death of the first son, which frustrated and nullified the object of the adoption, or whether they considered that the ceremonies of adoption had not been completely fulfilled in the case of the first son; for he died a few months afterwards, and, according to the testimony of several witnesses, before he had gone through the ceremonies of investiture. Yet although these circumstances have not been detailed, it is evident that by that decree the adoption of Anundindernarain, which it must be observed is nowhere described therein as a second adoption, was declared legal after a due consideration of all the objections urged, and he was pronounced a member of the family. The question of law, therefore, is quite irrelevant to the present case. The *Shasters* were merely consulted to ascertain whether the appellant Sheopershad, being descended from the same paternal grandfather, was entitled by the law of inheritance, to the estate in dispute; and the Court, in deciding that he is so entitled, have been guided by the above legal opinions and the *vyavasthá* submitted by the *pundits* in the case of Shamchuader and others, appellants, v. Narainee

Reason of
its prevalence
in Mithilá.

life and health; and hence it is usual for persons, when attacked by illness, and not before, to give authority to their wives to adopt. But in Mithilá, where this authority would be unavailable, the adoption is performed by the husband himself; and recourse is naturally had to that form of adoption which is most easy of performance, and therefore less likely to be frustrated by the impending dissolution of the party desirous of adopting.

Sanction of
the husband
not requisite

It is an universal rule in Bengal and Benares, that a woman can neither adopt a son, nor give away her son in adoption, without the sanction of her husband previously obtained; but it does not appear that the prohibition in Mithilá, which prevails against her receiving a son in adoption according to the *Dattaca* form, even with the previous sanc-

Dibia, respondent. There are certain other points which the Court consider it advisable to notice here.

1st. The authorities recited in the first *vyavasthá* submitted in this cause do not affect the adoption of two sons by one wife of a deceased person, or even a second adoption generally; nor is such an allegation supported by the tenor of former *vyavasthás*, furnished by the *pundits* in the cases of Shamchunder and other appellants, *v. Narainee Dibia*, respondent; and Goureepershad Chowdree, appellant, *v. Mussummaut Jymala*, respondent.

2dly. The respondent's *vakeel*, after the *vyavasthá* was submitted, and while the cause was still pending, only contended that the adoption was illegal, inasmuch as it had taken place without the consent of the husband.

3dly. In the proceeding of this Court, and in the question propounded to the *pundits*, only the word "adoption" was at first mentioned: the word "second" was subsequently added at the request of the respondent's *vakeel*, as it was thought that it would not materially affect the decision. It was, however, mentioned, that according to the evidence, it was doubtful whether the ceremonies of adoption in the first case were regularly fulfilled.

tion of her husband, he being dead, extends to her receiving a boy in adoption according to the *Critrima* form; and the son so adopted will perform her obsequies, and succeed to her peculiar property, though not to that of her deceased husband*. It is not uncommon in the province of Mithilá for the husband to adopt one *Critrima* son, and the wife another.

in this form of adoption.

The husband may have one *Critrima* son, and the wife another.

I have laid it down as a rule, that in the present age, adoption is allowable only in the *Dattaca*, *Dwyamushyuna*, and *Critrima* forms; but I find, on reference to the Elements of Hindu Law, that a question was agitated as to the admissibility of the *Crita*, or son bought. The point was much canvassed, and gave rise to a protracted controversy between two of the most eminent scholars of the day†; and there is a case in the Sudder Dewanny Adawlut Reports‡, in which the claimant was alleged to be of the *Paunerbhava* class §, and in which in all probability the claim would have been adjudged, had it been proved to be customary for sons of that description to succeed. Although, therefore, it may be asserted, that generally speaking, there are only three species of adoption allowable in the present age, yet the rule should be qualified, by admitting an exception in favour of any particular usage which may be proved to have had immemorial existence. Thus it appears that the *Goswamis*, and other devotees who lead a life of celibacy, buy children to adopt them in the form termed *Crita*, or son bought; and that the practice of appointing brothers to raise up male

Of the *Crita* son.

Of the *Paunerbhava*.

The *Goswamis* adopt in the *Crita* form.

* Suth. Synopsis, note 5, p. 222.

† See Elements Hindu Law, App. p. 107 *et seq.*

‡ Vol. i. p. 28.

§ See *Mitac.* Chap. i. Sect. 2, §§ 8.

Of the *Cshetraja*. issue to deceased, impotent, or even absent husbands still prevails in Orissa*. The son so produced is termed *Cshetraja*, or son of the wife; and doubtless these several sorts of subsidiary sons should be held entitled to the patrimony of their adopting fathers, in places where the *lex loci* would justify the affiliation†. In former times, it was the practice to affiliate daughters, in default of male issue; but the practice is now forbidden‡. The other forms of adoption enumerated by *Menu* § appear to be wholly obsolete in the present age. Any discussion, therefore, of their relative merits would be foreign to the purpose of this publication.

Other forms obsolete.

* Note to Dig. vol. iii. p. 276.

† See note, S. D. A. Reports, vol. ii. p. 175.

‡ *Jimutavahana*, cited in the Digest, vol. iii. p. 493.

§ Institutes, Chap. IV. §§ 159 and 160.

CHAPTER VII.

OF MINORITY.



Agreeably to the Hindu law, as current in the Benares and Mithilá schools, minority is held to last until after the expiration of sixteen years of age*; and according to the doctrine of Bengal, the end of fifteen years is the limit of minority†.

Age of minority.

A father is recognized as the legal guardian of his children, where he exists; and where the father is dead, the mother may assume the guardianship‡: but where the duties of manager and guardian are united, she is, in the exercise of the former capacity, necessarily subject to the control of her husband's relations: and with respect to the minor's person likewise, there are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which rests with the paternal kindred. In default of her, an elder brother of a minor is competent to

Of guardians.

Of the father's guardianship.

Of the mother's.

* "Until the minors arrive at years of discretion:" in the sense of restriction, before they attain their seventeenth year. The *Retnácara*. See Dig. vol. iv. p. 243. According to Colebrooke, sixteen years must be completed.—El. Hin. Law, App. p. 208.

† See Annotations on the *Dáyabhága*, p. 58; and Digest, vol. i. p. 300.

‡ And this has been held to include the stepmother, whose right of guardianship was declared to be superior to that of the minor's paternal uncle.—Bombay Reports, vol. ii. p. 144.

Of the paternal relations. assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity, but the appointment of guardians universally rests with the ruling power*.

Guardianship of a female; The guardianship of a female (whether she be a minor or adult) until she be disposed of in marriage, rests with her father: if he be dead, with her nearest paternal relations†. After her marriage, a woman is subjected to the control of her husband's family. In the first instance, her husband is her guardian: in default of him, her sons, grandsons, and great-grandsons are competent to assume the guardianship; and in default of them, her husband's heirs generally, or those who are entitled to inherit his estate after her death, are competent to exercise the duties of guardian over herself and her property.

during coverture, On failure of her husband's heirs, her paternal relations are her guardians; and failing them, her maternal kindred. In point of fact, females are kept in a continual state of pupillage.

and in widowhood.

The ruling power is the supreme guardian of all minors. The ruling power is in every instance, whether the natural and legal guardians be living or dead, recognized to be the legitimate and supreme guardian of the property of all minors, whether male or female‡: and it

* Dig. iii. 544. and Elem. Hindu Law, App. 202.

† See App. Elem. Hindu Law, p. 22. and 204.

‡ Thus the property of a woman, and the goods of a minor, falling into the king's power, should not be taken by him as owner: this has been already noticed. But it may be here remarked, that the property of a minor should be entrusted to heirs, and the rest appointed with his concurrence; or if the infant be absolutely incapable of discretion,

and it may here be mentioned, that agreeably to the regulations of Government, the state of minority is held to extend to the end of the eighteenth year *.

As to the power of guardians over the property of their wards, I apprehend that much misconception exists. As I understand the provisions on the subject, "minors are under the protection of the law; favoured in all things which are for their benefit; and not prejudiced by any thing to their disadvantage †." It has been laid down by Sir William Jones, that "assets may be followed in the hands of any representative ‡." This is doubtless true, but a latitude has been given to the rule which the terms of it do not warrant. It has been held, I believe, that for this purpose, a guardian may be considered as the representative of the deceased: whereas it is obvious, that *quoad hoc*, he is only the representative of his successor. I understand the expression to mean, that whoever takes the assets, whether near or remote in the order of inheritance, is liable for the debts of the deceased, so far as those assets go, provided such heir have attained the age of majority; and that, where the heir is a minor, the creditor must wait until the minority expires before he can come upon the assets for the liquidation of his debts. Subject to this condition, the son must pay his father's debts, as well as all necessary debts contracted on his account

Power of
guardians over
the property
of their wards.

with the consent of a near and unimpeachable friend, such as his mother and the rest." See Dig. vol. iv. page 243.

* Section 2, Regulation XXVI. 1793.

‡ Colebrooke on Obligations and Contracts, chap. x. §§ 585.

§ See note to Colebrooke's Translation of *Jagannātha's* Digest, vol. i. p. 266.

during his minority. And according to the Benares school, the debts of the father are binding on the son*, whether the former left property or not, as well as those of the grandfather; but he need not pay interest on the latter.

The following case arose but very lately in the court of Sudder Dewanny Adawlut. A, a Hindu *zemindar* of Bengal, executed a deed of sale for a portion of his estate to B; B executing a separate engagement that the sale should be redeemable by repayment of the money with interest within the term of a year. Before the term expired, the *zemindar* A died, leaving a widow and an adopted minor son, or rather a son adopted by authority, after his death, by the widow. Within a few days of the completion of the term when the sale would have become absolute and irrevocable, the widow, as guardian of the minor, borrowed money elsewhere of C, with which she paid the debt of B, and freed the land, executing to the lender a similar second sale of the same land, redeemable within a given term; which term, however, expired without repayment on her part. The question then here was, first, Could any rule of Hindu law prevent the land from becoming the property of B, on the term of the first sale expiring without repayment? Secondly, If there be no such rule, and the widow saved the land for a time by the

* But the obligation is considered only as a moral, and not a legal one, provided there are no assets. See Colebrooke, cited in App. Elem. Hindu Law, p. 347; but the same high authority has laid it down as a principle, in his Treatise on Obligations and Contracts, (chap. ii. §§ 51.) that heirs succeed to the obligations of ancestors without any reference to the adequacy of the property, and the rights of inheritance must be relinquished, when its obligations are repudiated. And see Elem. Hindu Law, App. p. 464 and 465.

second conditional sale, was it not a case of necessity, such as to justify her act in behalf of her ward, as clearly beneficial to him? Thirdly, If a father sell a portion of his land, with a condition for redemption, and his heir (a minor), or his guardian on his part, do not redeem, is not such land gone irrevocably? And fourthly, Do the debts of a father become payable out of his assets, even in the hands of his heir (who is a minor), on demand from the guardian? The substance of the reply of the Hindu law officers consulted on this occasion was, that no necessity for the sale had been made out, inasmuch as the estate of the deceased could not have been legally alienable for his ancestor's debts until after the minor had attained majority. Judgment was, however, given for the purchaser; and the following arguments were used on the occasion: That supposing the ancestor's conditional sale to have remained unredeemed after the expiration of the period stipulated, and the usual term of notice, the land would, of necessity, have fallen to the former creditor: That it was mere folly to urge, that the act of the mother in saving it for a time, and obtaining a further period, was not to be held good as an act evidently for the benefit of the minor, inasmuch as, but for her renewal by a fresh loan in her capacity of guardian, the conditional sale must undoubtedly have become absolute to the creditor: That according to the invariable practice of the courts, no plea of minority could be listened to, or any other doctrine recognized than that the estate of a Hindu of Bengal becomes liable at his death for the satisfaction of his just debts, especially where he has pledged his land as security for those debts, and that his power of selling outright or conditionally, any part of or all his landed property, could not be questioned: That any other

Question as to the liability of a minor and of his estate during his minority.

doctrine would involve in confusion the acts of the court for many years past, as there was scarcely a contract of conditional sale in the provinces where that form of contract prevails, in which some out of the numerous co-sharers were not minors when the sale became absolute; and that if their minority, in such cases, must be considered a bar to foreclosure, and cause the transaction to run on fifteen years longer, there would probably be an end to such transactions altogether, and it would not be possible to raise money at all, or at least not except on harder terms than at present: That the doctrine maintained by the court appeared to be supported by the opinion of the commentator *Jagannátha**, and that, though there should prove to be conflicting opinions as to the law, the established usage and practice ought to prevail: And, in short, that whatever might be the real doctrine of the Hindu law on the subject, the court was bound to follow that law in matters of inheritance, marriage, caste, and religious usages only, and not in matters of contract, of which nature the case in question appeared to be.

In answer to the above arguments, it may be observed, that supposing the minor's estate not to be liable, there did not exist any necessity for the widow's making a conditional sale. It may be assumed too, that, according to our own regulations, a mortgage would not be foreclosed against a minor, and that he would be allowed his equity of redemption on coming of age. It did not, therefore, signify whether the term of the mortgage was near expiring or not. It was

* See Digest, vol. i. Chap. 5, on payment of debts, and particularly text 172, as translated by Mr. Colebrooke.

at the lender's own risk to take a mortgage, in which the borrower's interest might expire before the expiration of the term.

I shall not, however, enter into any question as to the expediency or otherwise of the doctrine established in this instance, but content myself with a brief inquiry as to the law of the case, which appears quite clear, when disencumbered of the commentary of *Jagannátha*, whose authority cannot be held to be oracular or incontrovertible in any instance, especially where it is opposed by texts of unquestioned weight and indubitable import. The first text at all to the point is that of *Yājñyavalkya* (191). It has thus been translated by Mr. Colebrooke, with a view to adapt it to the subsequent commentary of *Jagannátha*. "He who has received the estate of a proprietor, leaving no son *capable of business*, must pay the debts *of the estate*, or on failure of him, the person who takes the wife of the deceased; but not the son whose father's assets are held by another." Now here it must be observed, that the words in *Italics* are not in the original, and that the expression "capable of business" is clearly an interpolation of the commentator. The original is *rikthagrahee*, or taker of the property. In the concluding part of the text it is distinctly stated, that the son whose father's assets are held by another must not pay the debts. The next text is that of *Nāreda* (172), which agreeably to *Jagannátha's* comment, has been thus translated by Mr. Colebrooke: "Of the successor to the estate, the guardian of the widow and the son *not competent to the management of affairs*, he who takes the assets becomes liable for the debts: the son, *though incompetent*, must pay

Authorities
on the subject
cited.

the *debt*, if there be no guardian of the widow, nor a successor of the estate; and the person who took the widow, if there be no successor to the estate, nor competent son." Here the original does not mean a son incompetent from minority to manage his affairs, but a son incompetent to inherit by reason of some natural disqualification, such as blindness, disease, or the like. A son, even though incompetent to inherit, in the same manner as a son who does not inherit assets, is morally bound to pay his father's debts; and the object of the above text is to show the obligation under which he lies, if there be no successor to the estate, nor guardian of the widow. There is nothing whatever, in any text that I have been able to discover, relative to the payment of debts by a guardian. Lastly come the two texts of *Catáyana* and *Náreda* (187 and 188.) "On the death of a father, *his debt* shall in no case be paid by his sons, incapable from nonage of conducting their own affairs; but at their full age of *fifteen years*, they shall pay it in proportion to their shares, otherwise they shall dwell hereafter in a region of horror." "Even though he be independent, a son incapable from nonage of conducting his affairs is not *immediately* liable for debts." It will be observed that *Jagannátha*, in commenting on these passages, attempts to make a distinction between minority and infancy, and infers that it is only during the latter state that a son is exempted from liability for his father's debts; but the text in the original is *apráptavyavádhāra*, which clearly means one who has not attained the age prescribed for the management of affairs. It follows, that where, owing to a son's minority, the father's assets are taken in charge by another person, such person cannot legally apply any portion of the assets to

the payment of the father's debts; and that it is only where a person succeeds to property in his own right, that he is at liberty to pay the debts of the ancestor by means of such property. A guardian may, indeed, dispose of a portion to meet a necessity arising for the minor's subsistence; but no necessity can by possibility arise for disposing of any portion to pay the minor's father's debts, for he must cease to be a minor before he can be liable. Nor does there appear to be much of hardship in this rule. The provisions of the English law savour of much more hardship; for, according to it, real estates are not subject at all to the payment of debts by simple contract, unless made so by will. All immoveable property, in the Hindu law, is subject to a kind of entail; so much so, that the right of the son is equal to that of the father, supposing the property to be ancestral: and it would be hard enough, under such circumstances, that the imprudence of the father should ruin the son*; for, as it is, he is bound, both legally and morally, to pay the debts: and it may be, perhaps, but just, that the period for exacting payment should be postponed until he comes to years of discretion sufficient to enable him to realize the means of satisfying the creditors with the least detriment to himself. The assets cannot in the mean time be alienated by the minor, and the creditor is ultimately sure, where assets exist, of receiving the amount of his demand with interest. Especially in a case of mortgage, where the produce of the property or usufruct might be awarded to the creditor in lieu of interest, which arrangement could not operate prejudicially to either party, or involve any breach of the Hindu law, for the usufruct of property is one species of legal interest which is called *bhogalábha*, or interest by enjoyment. The

Conclusion,
that the minor
heir and his
estate are not
liable for the
debt of his an-
cestor, until his
majority.

Cases cited
in confirmation
of the above
opinion.

pundits being called upon to expound the law in a case involving a similar question* which was recently decided at Bombay, they declared that a woman who had succeeded as heir at law, to property left by her own father, cannot dispose of that property in liquidation of the debts of her husband, unless her son, having already attained the age of sixteen years, or age of discretion, shall consent to the act. This, it will be observed, is a stronger case than the one above alluded to, because a son is bound to pay the debts of his father, whether he inherit assets, or not ; and by this decision it was determined, that property to which he had a claim in expectancy only, could not be alienated for that purpose, until he attain the age of majority ; and it was ruled also, in a case decided under the Madras presidency, that the father being dead, his son is not liable for his debts until after he has attained the age of seventeen†.

* Bombay Reports, vol. i. p. 176.

† Elem. Hindu Law, App. p. 206.

CHAPTER VIII.

OF SLAVERY.



Slavery, among the Hindus, cannot properly be enumerated among their religious institutions. In the year 1798, the court of Sudder Dewanny Adawlut, with reference to the long-established and sanctioned usage of slavery in these provinces, stated their opinion, "that the spirit of the rule for observing the Moohummudan and Hindu law, was applicable to cases of slavery, though not included in the letter of it." And this construction was confirmed by the Governor General in Council, on the 12th of April 1798; but it was at the same time admitted, that the rule in question is not directly and strictly applicable to questions of personal freedom and bondage*.

Construction
of the S. D. A.
on the subject
of slavery.

It will suffice, therefore, in this place, to give a general outline of the subject, which cannot be done in more comprehensive language than has been already employed by Mr. H. T. Colebrooke†. He observes, "The Hindu law fully recognizes slavery. It specifies in much detail the various modes by which a person becomes the slave of another, and which are reducible to the following heads, viz. capture in war, voluntary submission to slavery for diverse causes, (as a pecu-

* Harington's Analysis, note 3, p. 70, vol. i.

† Cited in Ibid. vol. iii. 743.

Origin and
condition of
slavery.

niary consideration, maintenance during a famine, &c.); involuntary for the discharge of debt, or by way of punishment of specific offences; birth, as offspring of a female slave; gift, sale, or other transfer by a former owner; and sale or gift of offspring by their parents. It treats the slave as the absolute property of his master, familiarly speaking of this species of property in association with cattle under the contemptuous designation of "bipeds and quadrupeds." It makes no provision for the protection of the slave from the cruelty and ill-treatment of an unfeeling master; nor defines the master's power over the person of his slave*; neither prescribing distinct limits to that power, nor declaring it to extend to life or limb. It allows to the slave no right of property, even in his own acquisitions, unless by the indulgence of his master. It affords no opening to his redemption and emancipation, (especially if he be a slave by birth or purchase,) unless by the voluntary manumission of him by his master, or in the special case of his saving his master's life, when he may demand his freedom†, and the portion of

* It will be seen, from the case of slavery (No. 9), that the *pundits* of the Sudder Dewanny Adawlut, when consulted on the subject, did not hesitate to assign limits to the master's power over the person of his slave; but in the delivery of their opinion they were probably guided by reason, rather than by express law, or perhaps from the analogy of the rule with respect to servants, *Menu*, Dig. ii. 209.

† But in this instance, *Juggannátha* makes a distinction. In vol. ii. p. 242, he gives the following illustration: "Where a slave, neglecting his own safety, and highly valuing his master's life, rescues him from the encounter of a tiger or the like, and is himself preserved by the act of God; in that case he is released from slavery. But if some person attempt to destroy a man by poison, and the slave of that man discovering it, prevent him from eating the poisoned food; or if the master intended to go out of his house, not aware of a tiger, standing at the

a son ; or in that of a female slave bearing issue to her master, when both she and her offspring are entitled to freedom, if he have not legitimate issue ; or in the particular instances of persons enslaved for temporary causes, (as debt, amercement, cohabitation with a slave, and maintenance in consideration of servitude,) on the cessation of the grounds of slavery, by the discharge of the debt or mulct, discontinuance of the cohabitation, or relinquishment of the maintenance.”

Those slaves who correspond to the designation of *adscripti glebæ*, or hereditary serfs, and who, according to the same eminent authority*, are common in the upper provinces, are subject to the laws of ancestral real property, and cannot be transferred except under similar restrictions. Over land acquired by the grandfather, over a corrody, and over slaves employed in the husbandry, says *Kājnyawalcya*, the father and the son have equal dominion†. All other descriptions of slaves would appear to class with personal property.

Classed as personal property, with one exception.

The question of ameliorating the condition of slaves in India has not escaped the consideration of Government ; but the difficulty of legislating on so delicate a subject must be obvious. Every one who has had the good fortune to be born in a state of freedom must be sensible of its invaluable blessings, and numerous arguments will occur to every mind in favour of the abolition of slavery.

Question as to the abolition of slavery.

That the evils of slavery are manifold, is unquestionable. That its total and immediate suppression might be followed

door, but his slave, seeing the tiger, prevent him ; in these and similar cases, it may be admitted he is not released from servitude.”

* Ibid. 745.

† Cited in Dig. vol. ii. 159. .

by mischievous consequences, can admit but of as little question; while in India it must be confessed, whatever objections may be theoretically advanced to its existence, the condition of the slave himself differs in not much more than in name from that of a hired servant. Speaking of Moohummudan slavery in another place*, I observed: "In India, (generally speaking,) between a slave and a free servant there is no distinction but in the name, and in the superior indulgences enjoyed by the former: he is exempt from the common cares of providing for himself and family: his master has an obvious interest in treating him with lenity; and the easy performance of the ordinary household duties is all that is exacted in return." I have no reason to believe that the system of slavery, as it exists among the Hindus, is productive of much individual misery, however baneful its effects may be to society at large. The courts of justice are accessible to slaves as well as to freemen, and a British magistrate would never permit the plea of proprietary right to be urged in defence of oppression. If, then, but few grievances are complained of, it is fair to infer that few exist.

And as to substituting the Moohummudan for the Hindoo law in this respect.

It was one of the suggestions of the philanthropic individual† who advocated the cause of the abolition of slavery in India, that, in the event of its being deemed inexpedient to suppress the system altogether, the Moohummudan law, as being more lenient in its provisions, should be universally adopted, to the exclusion of that of the Hindus. But to the latter class, it is evident that the standard of the former

* Prelim. Rem. Prin. and Prec. Mooh. Law.

† Mr J. Richardson, formerly judge and magistrate of Bundelkund, who in the year 1810, submitted the draft of a regulation on the subject.

would not admit of adaptation ; for according to the Moosulman tenets, they only are, legally speaking, slaves, who are captured in an infidel territory in time of war, or who are the descendants of such captives. Capture in war is indeed a cause of slavery according to the Hindu law, as well as according to the Moohummudan ; and perhaps among all other nations, the same cause was originally productive of the same effect. The triumph of the strong over the weak destroys the natural equality of the human condition ; and to a savage mind, the persons of the conquered obviously suggest themselves as the legitimate reward of victory. To this source in all countries, may be traced the privation of freedom. But with the gradual increase of civilization, when superiority of physical force alone became less respected, other causes operated to the establishment of servitude of a more or less qualified nature : and thus, with the Hindus, besides the right accruing from conquest, and transfer implying a previously existing right, (which comprehend the *Grihajatu*, or one born of a female slave in the house of her master ; the *Crita*, or one bought ; the *Lubdha*, or one received by donation ; and the *Crumagata*, or one inherited from ancestors,) there is that species of slave termed *Atmabikrya*, or one self-sold, signifying him who for a pecuniary consideration barter his own freedom. All the slaves above enumerated, and their offspring, must be considered to be in a state of permanent and hereditary thralldom.

Of permanent slavery,

There exists, besides, the state of bondage in various temporary forms, many of them differing slightly, if at all, from voluntary servitude. One who offers himself willingly as a slave, he who was won in a stake, and even a captive in war, may effect their own emancipation by offering a proper sub-

and temporary.

stitute*. One who enters into a state of slavery for the sake of maintenance, and he who becomes a slave for the sake of his bride, may both be restored to freedom, on relinquishing the object which induced them to part with it†. A pair of oxen is the price of emancipation to one maintained in a famine; while one relieved from a great debt, and he who has been pledged for a certain sum, or hired for a specific period of slavery, are emancipated, the two former on payment of the consideration, and the latter on the expiration of the term‡. An apostate from religious mendicity, is he who forsakes his duty, and deviates from the rules of the order which he has imposed on himself, as if he were to take a wife, or otherwise act like a householder§, in which case he should be condemned to a state of slavery; but it is inferrible, that the offence may be expiated by the payment of a fine ||.

Emancipation
how obtain-
able.

From the above it will be perceived, that there are five descriptions of permanent thralldom, from which emancipation can be effected only at the will and pleasure of the master, and that four of those five are consequent on a pre-existing state of slavery. For the rest, on performance of certain conditions peculiar to each, the slave is entitled to freedom.

It must be owned, that the recognition of legal slavery in any form must tend to perpetuate its existence: but at the

* *Náreda*, cited in Dig. vol. ii. 246.

† *Náreda*, cited in Dig. vol. ii. 247.

‡ *Náreda*, Ibid. 243, 347.

§ Dig. 227.

|| Ibid. 229.

same time, long-established usages should be respected, especially where society has not attained such a state of civilization, as to admit of a clear perception of the general benefits intended to result from an invasion of individual rights: and so long as the legislature, in its wisdom, and from a respect for ancient institutions, shall not deem it advisable to interfere with a view to the suppression of the system, it can only be hoped that the gradual diffusion of knowledge, and the consequent spread of enlightened notions, will tend to convince all ranks of the community, that rational liberty is the condition most conducive to the happiness and interests of mankind*.

* There are nine cases illustrative of the doctrine of slavery given in the second volume of this work. The question appears also to have been a good deal discussed in the courts subordinate to the presidencies of Madras and Bombay. See *Elem. Hin. Law, App. p. 230, et seq.*

CHAPTER IX.

OF CONTRACTS.



The principles of the Hindu law relative to contracts, are founded on the basis of good sense and equity. The same incapacitating circumstances which are the means of avoiding contracts, according to other systems, have been specified by the Hindu jurists. Thus insanity, minority, coverture, lesion, error, force, fraud, incompetency, incapacity, and revocation*, are each the cause of effecting the dissolution of obligations. To these must be added degradation, entry into a religious order†, and any predicament that operates as a civil death.

Causes of
dissolving obli-
gations.

The term insanity comprehends not only madmen and idiots, but also all those who labour under any species of fatuity, and who are naturally destitute of power to discriminate what may, and may not be done‡.

Insanity.

* *Prihaspati*, cited in Dig. vol. ii. page 328. *Menu*, Ibid. vol. i. 458.

† *Vaatsishtha*, Ibid. vol. iii. 327.

‡ Dig. vol. ii. 187. There is a case detailed in the Bombay Reports, (vol. ii. p. 114,) in which the sale of a house by an aged, infirm, and foolish man was set aside at the suit of his wife, upon a *vysavastha* of

Minority. Minority continues until after a man has entered his sixteenth year, when he becomes acquainted with affairs, or *adult in law**: but in the Hindu law, minority is used as a term of an indefinite import, and comprehends those who are incapacitated from conducting their own affairs by extreme old age, as well as those who are incapable, owing to their extreme youth†.

Cverture. The Hindu law recognizes the absolute dominion of a married woman over her separate and particular property, except land given to her by her husband. He has, nevertheless, power to use and consume it in case of distress; and she is subject to his controul, even in regard to her separate and peculiar property‡. It is a general rule, that coverture incapacitates a woman from all contracts; but those contracts are valid and binding which are made by wives, the livelihood of whose husbands chiefly depends on their labour§; so also are those made for the support of the family, during the absence or disability, mental or corporeal, of the husband ||.

Lesion. A contract, says *Menu**, “made by a person intoxicated, or insane, or grievously disordered, or wholly dependant, by an infant, or a decrepid old man, or *in the name of ano-*

the Hindu law officers, the price paid being proved to be inadequate, though it was not by any means established that the vender was an idiot.

* *Smriti*, cited in Dig. vol. ii. 115.

† Dig. vol. ii. 187.

‡ Colebrooke, Obl. and Con. Book 4. vi. §§ 611.

§ Dig. vol. i. 318; and see case 2. Chap. of Debts, vol. ii.

|| Dig. vol. i. 296.

ther by a person without authority, is null." In these cases, lesion may be presumed on the ground of incompetency. But among persons who are competent, the maxim of "*caveat emptor*" applies. Thus, *Nāreda* ordains: "A buyer ought at first himself to inspect the commodity, and ascertain what is good and bad in it; and what after such inspection he has agreed to buy, he shall not return to the seller, '*unless it had a concealed blemish**.'" There is indeed a provision similar to that which obtains in the Moohummudan law, giving an option of inspection; and with respect to articles not of a perishable nature, the contract may be rescinded within ten days†. For other articles of a perishable nature, there are different periods allowed, subject to the payment of a small fine by the rescinding party‡.

A gift may be revoked, if made under a mistake; and by analogy to this rule, every contract is vitiated by error§. Error.

Any species of duress vitiates a contract. Thus *Jagannātha*, commenting on the text of *Nāreda*, to the effect that what a man does while disturbed from his natural state of mind is void, observes: "In cases of fear and compulsion, the man is not guided solely by his own will, but solely by the will of another. If, terrified by another, he give his whole estate to any person for relieving him from apprehension, his mind is not in its natural state; but after recovering tranquillity, if he give any thing in the form of a recom- Force.

* Cited in Dig. vol. ii. 313.

† *Menu*.

‡ Dig. vol. ii. 321.

§ Colebrooke, Obl. and Con. Book 2. vii. §§ 102.

pense, the donation is valid*. This corresponds with what has been stated by Mr. Colebrooke in his Treatise on Obligations and Contracts, that though by the Hindu law all things done by force are pronounced null, yet in fact they are, in every system of jurisprudence, *voidable* rather than *void*; as they are susceptible of confirmation by assent subsequent, whether express or tacit†.

Fraud.

Under the head of fraud, it may be observed, that any fraudulent practice, (to which the word in the original, *chhala*, is synonymous,) vitiates a contract‡; and in a contract of sale, if the vender, having shewn a specimen of property free from blemish, deliver blemished property, the vendee may return it at any time, and the vender is liable to pay a fine and damages, on account of his dishonesty§.

Incompetency.

Of incompetency to contract, where the possession and even the proprietary right exists, there are frequent instances. The most familiar is that of a coparcener, who is prohibited from giving, mortgaging, or selling his own share of the immoveable estate, except at a time of distress, for the support of his household ||. According to the law, however, as current in Bengal, the contract, though not valid so far as regards the shares of the other parceners, is valid so far as regards the seller's own share ¶. And not only

* Dig. vol. ii. 183.

† Ch. vii. §§ 109.

‡ Ibid.

§ *Catyáyana* and *Náreda*, cited in Dig. vol. ii. 323. 324.

|| *Vyasa*, cited in Dig. vol. iii. 433.

¶ Ibid. 434.

are the survivors answerable for a debt contracted by their deceased partner, if the sum borrowed was applied to their use; but, according to *Menu*, "should even a slave make a contract in the name of his absent master for the behoof of the family, that master, whether in his own country or abroad, shall not rescind it." A similar prohibition extends to the case of widows on whom the property of their husbands has devolved, and who are declared incompetent to alienate, except for special purposes; and in a case recently adjudicated, where the heirs of a person deceased refused payment of a bond contracted by his widow (also dead), and in which it was proved that part of the amount was expended in payment of her husband's debts, it was held, that the heirs were liable for so much of the amount as had been so laid out, but that the widow could not saddle the estate or the heirs with any unnecessary burthen*; and it has been laid down as a general principle by Mr. Colebrooke, that the head of a family is answerable for necessities supplied for the indispensable use of it, and for the subsistence of the persons whom he is bound to maintain, whether it be his wife, his parent, his child, his slave, his servant, his pupil, or his apprentice to whom the necessities are furnished, and goods indispensably requisite are delivered†.

In recapitulating the causes of incapacity, *Yājñyavalkya* observes: "A contract made by a person intoxicated, or insane, or grievously disordered or disabled, by an infant, or a man agitated by fear or the like, or in the name of ano-

Incapacity.

* Ibid, p. 201.

† Obl. and Con. Book 2. §§ 49.

ther by a person without authority, is utterly null." Upon the above passage *Jagannátha* thus comments: "Singly the gift of wages of a man possessing his senses is valid; joined with madness or the like, the intentional payment of wages during a lucid interval may also be valid; but singly a gift by a man affected by insanity or the like is void." From this comment the principle may be deduced, that the act of a lunatic may be effectual, if the contract be onerous and the agreement rational, on the presumption of the act having been done during a lucid interval; but that where it may be prejudicial to him, and unattended with any benefit, it should be held to be *ipso facto* void: so also the validity of a deed executed by a man in his last illness should be upheld, if it be proved that he was of sound mind at the time of its execution; but otherwise, if it appear that his mind was not in its natural state.

This point was ruled by the *Sudder Dewanny Adawlut*, in a suit by a Hindu widow against the brothers of her husband, who died childless; to which the defendants pleaded a conveyance from the brother to them, executed during mortal sickness, four days before he died; and it was held, that in law, the only question was, whether in point of fact he was of sound mind at the time*.

Revocation.

Eight gifts, according to *Catyáyana*, are not subject to revocation or retraction: What has been given as wages, as the price of an entertainment, as the price of goods sold, as a nuptial gift to a bride or her family, as an ac-

* Case of *Radhamunee Debia, v. Shamchunder and Rooderchunder*, S. D. A. Reports, vol. i. p. 85.

knowledge to a benefactor, as a present to a worthy man, from natural affection, or from friendship*. *Harita* declares : “ A promise *legally* made in words, but not performed in deed, is a debt of conscience, both in this world and the next ; but where a promise has been made, or a thing given, to a person whom the law declares incapable of receiving, or where it has been given for a consideration unperformed, the law permits the nonperformance of the promise in the one case, and the revocation in the other†. It is a general rule, that in the case of a pledge, a gift, or a sale, the prior contract has the greatest force, and that in all other contested matters the latest act shall prevail‡.

The liquidation of debts is rigorously enjoined : for instance, it is provided that sons must pay the debt of their father, when proved, as if it were their own, that is, with interest, and whether they have inherited assets or not.—The son’s son must pay the debt of his grandfather, but without interest ; and his son, that is, the great-grandson, shall not be compelled to discharge the debt, unless he be heir and have assets §. The reason of this last-mentioned distinction is not very obvious, nor does it appear why the equitable principle of rendering assets requisite to responsibility should be limited to the great-grandson alone. But in all cases, the liability extends only to just and reasonable

What contracts are binding on representatives.

* Dig. vol. ii. 174.

† Dig. ii. 171.

‡ *Yājñyavalkya*, cited in Dig. i. 477.

§ Dig. vol. i. p. 266. According to Sir William Jones, where there are no assets, the son and grandson are under a moral and religious, but not a civil, obligation to pay the debts. See note to *Ibid*.

debts. Hindu gifts are not binding on representatives: and in a case where a person contracted to pay to another a sum of money in consideration of that person's giving his daughter in marriage to the son of the contracting party, it was held that the contract was not binding after his death; the law not permitting money to be given for a bride, and the consideration consequently not being a legal one*: and it should be observed, that in all such cases the turpitude is considered to be on the side of the receiver, the giver not being deemed to have seriously intended to give†.

I deem it wholly superfluous to enter into further disquisition relative to the law of contracts, bailment, or other matters connected with judicial proceedings. They who are desirous of further information on this head, and other miscellaneous matters, should consult the "*Elements of Hindu Law*," which contains an epitome of the law of Contracts, and "*Considerations on the Hindu Law*, as current in Bengal," in which will be found a compilation of the principal rules connected with the subject. Were any outline of the subjects alluded to attempted in this place, the result would probably be a repetition, in substance, of what has been laid down by the above-mentioned authorities. The rules connected with the law of evidence are few and simple. The testimony of any person interested in the case is not admissible. Various descriptions of incompetent witnesses are enumerated, and much is left to the discretion of the judge with respect to the credit which should be attached to testimony. In the last resort, discovery may be

* Bom. Rep. vol. ii. p. 194.

† Obl. and Con. Book 2. §§ 124.

had by compelling a defendant to make oath, or by ordeal.—
On the subject of evidence, it will be perceived that one or two cases have been propounded to the Hindu law officers in the *mofussil* courts: but with reference to this and other topics connected with judicial proceedings generally, I beg to refer to the following chapters.

A TRANSLATION
OF
A PORTION
OF
THE MITACSHARA.

CHAPTER I.

MITACSHARA.



ON THE ADMINISTRATION OF JUSTICE.



SECTION I.

Constitution of a Judicial Assembly.

1. The protection of his subjects is the chief duty of a consecrated and otherwise qualified king, and this cannot be performed without restraining evil doers. But they cannot be discovered without legal investigation. Wherefore it is requisite, that daily attention should be paid to judicial proceedings, which gave rise to the text: “The king in person, being aided by assessors, should daily investigate judicial proceedings*.” But no explanation has yet been given of the nature, number, and forms of judicial proceedings. This second lecture is now commenced with a view of elucidating these points.

Judicial duty
of a king.

2. “The king, divested of anger and avarice, and associated with learned Brahmins, should investigate judicial proceedings conformably to the sacred code of laws†.”

What law to
be followed.

* This refers to a former passage of *Yājñyavalkya* cited in the chapter treating of *Achar*.

† *Yājñyavalkya*, cited in the *Vyavahāramādhava*, *Smṛitichandricā*, *Vyavahāramayūc'ha*, *Smṛitichintamani*, *Veeramitrodaya*, and *Vivādan-dava*.

General definition of a judicial proceeding.

3. *Judicial proceedings.*] The assumption of a fact in favour of one's self, to the exclusion of the interests of another. Thus, for example, one person asserts, "This field *or the like*, is my property," and another in opposition asserts, "It is mine."

•

Use of the plural number.

4. The plural number is used to show the multiplicity of judicial proceedings.

The duty is incumbent on all governors.

5. *The king.*] The use of this word demonstrates that the duty here enjoined is not confined to the military tribe, but extends to all those on whom the care of Government devolves.

Further explanation of the text.

6. *Investigate.*] The repetition of this word is used for the sake of enjoining the particular duty.—[*With learned.*] With those acquainted with the code of laws, the *Vedas*, the science of grammar, &c*.—[*Brahmins.*] Not persons of the military or other tribes.

Responsibility of the king.

Hence it follows, that the king, and not the Brahmins, is responsible for the neglect or perversion of justice; as *Menu* has said: "A king who inflicts punishment on such as deserve it not, and inflicts no punishment on such as deserve it, brings infamy on himself, while he lives, and shall sink, when he dies, to a region of torment†."

* The use of the third or causative case here denotes their inferiority: it being a rule of grammar, that the preposition should be connected with a secondary agent.

† *Menu*, 8. 128. cited in the *Dundavivaca*, *Viramitrodaya*, *Vyavahāramādhava*, &c.

7. *Conformably to the sacred code of laws.*] Not according to ethical law. Local, temporal, and other ordinances which are not in opposition to the sacred code, are not separately treated of, as they do not form a different subject. Moreover, the following text may be here recited: "A man should pay implicit obedience to any temporal regulation or legal enactment which may not militate against his peculiar duty*."

Explanation of what law to be followed.

8. *Divested of anger and avarice.*] Conformity to the sacred code having been already enjoined, this injunction seems to be superfluous; but it is used to show the paramount necessity of such conduct. "*Anger*," impatience of temper; "*avarice*," excessive desire of gain.

Of the terms anger and avarice.

9. Moreover, "Persons who are versed in literature, acquainted with the law, addicted to truth, and impartial towards friend and foe, should be appointed assessors of the court by the king†."

Appointment of assessors.

10. *Persons who are versed in literature:*] that is, who are eminent in the study of philosophy, grammar, &c., and in comprehending the *Vedas*. "*Acquainted with the law:*" familiar with the sacred code of laws. "*Addicted to truth:*" prone to habitual veracity. "*Impartial towards friend and foe:*" divested of enmity, affection, partiality, prejudice, and the like. Let persons with the qualities here described

Explanation of the text.

* *Yājñyavalkya*, cited in the *Dīpācalica*, *Vīramitrodaya*, *Smṛitichintāmaṇi*, and *Vyavahāramādhava*.

† *Yājñyavalkya*, cited in the Commentary of *Vīramitrodaya*, *Dīpācalica*, *Vyavahāramādhava*, *Vivādārnavasetu*, *Vivādabhaṅgārṇava*, *Vivādatandava*, *Vyavahāramayūc'ha*, and *Smṛitrichandricā*.

be seated in the assembly, as assessors (*Subhasuda*) induced by regal generosity, honours, and respect.

Should belong to the Brahminical tribe.

11. Although the epithet "versed in literature" has here been used without restriction, yet it is intended to be confined to the Brahminical tribe, as *Catyáyana* has stated: "He (the king) should be associated with assessors, wise, experienced, eminent, of the highest tribe, familiar with the meaning of the sacred and moral codes*."

Number of the assessors.

12. These assessors are to be three in number, as the use of the plural requires; and this appears also to be the requisite number from the text of *Menu*: "In whatever country three Brahmins, particularly skilled in the several *Vedas*, preside, &c†." But *Vrihaspati* has declared, that the number may be either three, five, or seven: "That assembly in which seven, five, or even three Brahmins versed in religious and worldly duties, preside, is equal to sacrificial ground‡."

Assessors are distinct from the first mentioned Brahmins.

13. The epithet "versed in literature" must not be construed to apply to the Brahmins mentioned in the first text, because the epithet here used is in the first or nominative case, and cannot consequently consist with the term Brah-

* *Viramitrodaya*, *Smritichandricā*, *Calpataru*.

† The remainder of the text is, "together with the learned Brahmin appointed by the king, the wise call that assembly a court of judicature." *Menu*, 8. 11. *Smritichandrica*, *Medhathithee*, *Viramitrodaya*.

‡ *Vrihaspati*, cited in the *Smritichintāmani*, *Vivadatandava*, *Vyavahāramayūc'ha*, *Vyavahāramādhava*, *Viramitrodaya*, *Madhaviya*, *Calpataru*, &c.

mins mentioned in the former text, which appears in the third or causative case ; besides which, there would be a repeated mention of the requisite quality of learning. *Catyáyana* has propounded an evident distinction between the Brahmins and assessors. " A king who investigates together with his chief judge, ministers, domestic priest, and assessors of the court, according to law, shall attain paradise*."

14. The difference here is, that the Brahmins are not appointed, and the assessors are. Hence it has been ordained : Duty of assessors. " A person, whether appointed or not, is entitled to furnish legal advice†." It behoves those who are appointed officers to oppose a king proceeding illegally, after they have tendered true counsel : by acting otherwise they are culpable, as declared by *Catyáyana* : " Those assessors who follow a king pursuing the path of injustice, become participators in his act‡." Hence it follows, that he should be remonstrated with by them.

15. They, on the other hand, who are not appointed formally, become culpable by offering illegal advice, or withholding their counsel, but not by omitting opposition. This is conformable to the ordinance of *Menu*. " Either the court must not be entered by judges, parties, and witnesses, or Duty of other counsellors.

* *Veeramitrodaya*, *Vyavaháramayūc'ha*, *Smritichandricá*, *Smritichintámani*, *Vyavaháramadhava*.

† Cited in the *Veeramitrodaya*, as the text of *Vasishta*, but as the text of *Náreda* in the *Vyavaháramayūc'ha*, and *Smritichintámani*.

‡ *Smritichintámani*, *Vivádatandava*, *Vyavaháramadhava*.

law and truth must be openly declared : that man is criminal, who either says nothing, or says what is false and unjust*."

A few men
of the commercial class should
be called in.

16. From the conjunction "and," used in the text, (§§ 10,) it appears, that for the sake of adding popular confidence to the assembly, some persons of the commercial class should also be called in to assist, as *Catyáyana* says : "A few merchants should be summoned, men of good family and disposition, of a respectable age and good conduct, wealthy, and devoid of envy†".

King may
appoint a re-
presentative.

17. It has been stated, that the king should investigate judicial proceedings, but an alternative is propounded : "A Brahmin acquainted with all duties should be appointed, and associated with the assessors, by a king who is unable through want of leisure to investigate judicial proceedings‡."

Text ex-
plained.

18. *A Brahmin* : [Not a man of the military or other tribes. —*Acquainted with all duties* :] One who knows and revolves in his mind all duties, whether of temporal origin or enjoined by law, is to be appointed, and associated with the assessors, by a king whose mind is engrossed with other affairs, for the purpose of investigating judicial proceedings.

* *Menu*, 8, 13, cited in the *Smritichintāmani*, but as the text of *Catyáyana* in the *Vivádatandava*, *Dundaviveca*, and as the text of *Menu* and *Náreda* in the *Smritisāra*, *Medhatithee*, *Cullucabhāta*.

† Cited in the *Smritichandricā*, *Calpataru*, *Mádhaveeya*, *Veeramitrodaya*, *Vivádatandava*.

‡ *Yājñavalkya*, cited in the *Vyavahāramayac'ha*, *Veeramitrodaya*, *Dipacalica*, *Smritichintāmani*, *Vivádatandava*, and by *Aparaditya*.

19. He should appoint a Brahmin endued with such qualities as *Catyáyana* has described in the following text: "Subdued, of a respectable family, impartial, temperate, firm, mindful of futurity, virtuous, attentive, uninfluenced by passion*."

Qualifications of the representative.

20. If such a Brahmin cannot be found, the king may appoint a *Cshetrya* or a *Vaisya*, but not a *Sudra*, as *Catyáyana* has said: "Where there is not a [qualified] Brahmin, he may appoint a man of the military or mercantile tribe who is conversant with jurisprudence, but a *Sudra* must carefully be avoided†."

Tribe of the representative.

21. *Nāreda* has mentioned this representative as a principal: "Taking the sacred code of laws as his (guide), and deferring to the opinion of the chief judge, let the king deliberately and regularly investigate judicial proceedings‡."

Supremacy of the chief judge.

22. *Deferring to the opinion of the chief judge:*] Not relying exclusively on his own; in like manner as a king by means of his spy beholds the army of his enemy.

Explanation of the text.

23. The term *Pradvivak*, or chief judge, is etymologically appropriate. He interrogates (*prichutee*) the plaintiff and defendant: hence is derived by grammatical rules the active participle *prad*, the interrogator. With the assessors

Etymological derivation of the term.

* Cited in the *Smritichandrica*, *Calpataru*, *Veeramitrodaya*, and *Smritichintāmani*.

† Cited in the *Smritichandrica*, *Calpataru*, *Mādhaviya*, *Dipacalica*.

‡ *Nāreda*, cited in the *Veeramitrodaya* and *Vivādatandava*.

he weighs or investigates (*vivechyutee*) the truth or falsehood of their assertions: hence is derived *vivak*, the investigator: hence, by the compound, he is termed *Pradvivak*. It is said, "He who, with (*in the presence of*) the assessors, carefully inquires into the subject matter, and investigates the point at issue, is termed the *Pradvivak*, or chief judge*."

Punishment
of unrighteous
judges.

24. So also: "Those judges who act unconformably to the laws, or otherwise improperly, are to be severally amerced in twice the amount of the suit, whether under the influence of partiality, avarice, or fear†."

Explanation
of the text.

25. *Those judges who act unconformably to the laws:]* In opposition to the sacred code.—"Or otherwise improperly:" Inconsistently with approved usage.—"Under the influence of partiality:" Swayed by undue bias.—Avarice, excessive desire of gain.—Fear, terror: or otherwise subdued by the prevalence of their passions;—"are to be severally," one by one,—"*amerced in twice the amount of the suit,*" in double the penalty incurred by the losing party, not in twice the value of the thing in dispute; for were such the law, in actions relative to adultery and the like, there could be no fine.

Penalty in-
curred only
where the
wrong is wilful.

26. The specific mention of partiality, avarice, or fear, implies, that the penalty of twice the amount does not extend to cases of error, inadvertence, or the like. Such is the import of the injunction.

* *Vyāsa*, cited in the *Vivādatandava*, and by *Calpataru*.

† *Yājñwalkya*, cited in the *Dipacalica*, and by *Mitramisra*, *Apara-ditya*, &c.

27. "The king is superior to all, except Brahmins*." From this text of *Goutama* it must not be inferred that Brahmins are exempt from amercement, for the text is intended merely for the purpose of generally extolling the Brahminical tribe. It is ordained in the *Sutra*: "Six things are to be avoided by the king [acting with respect to the Brahmins:] The punishment of flagellation, of imprisonment, of amercement, of banishment, of reprimand, and of expulsion†." But the excepted person must be eminently learned, skilled in worldly affairs, in the *Vedas* and *Vedangas*: intuitively wise, well stored with tradition and historical wisdom, continually revolving these subjects in his mind, conforming to them in practice, instructed in the forty-eight ceremonies, devoted to the observance of his three-fold and six-fold duties, and versed in local usages and established rules‡. The mere order of priesthood is not sufficient to exempt.

Brahmins
may be amerc-
ed.

SECTION 2.

On the Subject of a Judicial Proceeding.

1. The subject of a judicial proceeding is now propounded. "When a person aggrieved by another in a manner contrary to law or approved usage, represents it to the king, or the chief judge, that representation is termed the subject of a judicial proceeding §."

Subject of a
judicial pro-
ceeding defin-
ed.

* Cited in the *Veeramitrodaya*, *Dandaviveka*, and *Vivádatandava*, as the text of *Goutama* and *Vasishtha*.

† Cited in the *Dundaviveka* and *Vivádatandava* as the text of *Goutama* and *Vasishtha*.

‡ Cited in the *Veeramitrodaya*, and *Vivádatandava*.

§ *Yājñyavalkya*, cited in the *Deepacalcā*, *Veeramitrodaya*, *Subodhini*, *Smritichintāmani*, *Vivádatandava*, *Vyavaharāmāyūc'ha*, *Mādhaviya*, and *Smritisāra*.

Explanation
of the text.

2. When a person aggrieved or distressed by another, in a manner or through means inconsistent with, or contrary to approved usages or law, represents or sets forth his grievance to the king, or chief judge, that grievance so represented is termed the subject of a judicial proceeding, the component parts of which are the declaration or charge, and the answer, and, which forms the groundwork of deliberation, evidence, and decision and judgment. This is its general definition.

Charges are
twofold. Pre-
sumptive and
positive.

A charge or declaration is twofold, presumptive and positive, as *Ndreda* has declared: "Allegations are comprized under two heads, presumptive and positive, depending on presumption or certainty. Presumption may arise from a person's keeping bad society, and certainty from some visible proof, as seeing the stolen property," &c*.

Positive
charge are
twofold, for
commission or
omission.

4. A charge or declaration founded on certainty, is of two descriptions, of omission and of commission. The former is exemplified by this allegation, "He has received my gold, (or other article,) and will not restore it;" and the latter, "He has forcibly seized my land." *Catyáyana* has propounded the distinction, "He is unwilling to do justice, or he does an act of injustice†."

Subjects of
judicial pro-
ceedings are
eighteen fold.

5. Subjects of judicial proceeding are propounded as being of eighteen sorts, according to *Menu*. "Of those titles, the first is debt, or loans for consumption; the second,

* Cited in the *Vivádatandava* and *Smritichintamani*.

† Cited in the *Vivádatandava* and *Veeramitrodaya*.

deposits, and loans for use; the third, sale without ownership; the fourth, concerns among partners; the fifth, subtraction of what has been given; the sixth, nonpayment of wages or hire; the seventh, nonperformance of agreements; the eighth, rescission of sale and purchase; the ninth, disputes between master and servant; the tenth, contests on boundaries; the eleventh and twelfth, assault and slander; the thirteenth, larceny; the fourteenth, robbery and other violence; the fifteenth, adultery; the sixteenth, altercation between man and wife, and their several duties; the seventeenth, the law of inheritance; the eighteenth, gaming with dice, and with living creatures: these eighteen titles of law are settled as the groundwork of all judicial procedure in this world*."

6. These also are greatly multiplied by the diversity of claims, as *Nāreda* has declared: "Of these also the distinctions are a hundred and eight fold. From the diversity of men's claims, there are a hundred ramifications†."

Diversity of claims.

7. From the words, "when a person aggrieved represents to the king," it follows that he himself should come forward and voluntarily make the representation, and not at the instigation of the king or his officer, or their deputies, as *Menu* has declared: "Neither the king nor his officers must ever promote litigation, nor on any account neglect a lawsuit instituted by others ‡."

Complaint should be made voluntarily.

* *Menu* 8, § 5, 6, and 7. Cited in the *Smritichintāmani*, *Vyavaharamayāc'ha*, *Deepacalica*, *Medhatithi*, *Vivādabhangarnava*, and by *Mitrāmīśra*, *Cullucabhata*, and *Govind Raj*, but in the *Vivādatandava* as the text of *Menu* and *Marichi*.

† Cited in the *Vivādatandava* and *Veeramitrodaya*.

‡ *Menu* 8, 43. Cited in the *Veeramitrodaya*, *Medhatithi*, by *Cullucabhata*, *Govind Raj*, *Mitrāmīśra*, and in the *Mādhaveya* and *Smritichintāmani*.

There may be many complainants against one.

8. *By others.*] This term includes the singular, dual, and plural number. Hence it is evident that an allegation may be made by one, two, or more persons against the same individual. But the following text of *Nāreda*, "An allegation of one person against many, of females or a servant, must be rejected, as is declared by those who are conversant with law*," applies to a case where issues are distinct.

SECTION 3.

Process of Citation.

Summons to be served on him against whom the allegation is made.

From the words "represents it to the king," (Section 2, §§ 1,) it appears that the complainant, after being interrogated, should humbly state his case. Should the representation appear just, his adversary, unless exempted by infirmity, should be summoned by means of an order under seal, or so forth. This is an obvious consequence, and has not therefore been noticed by the author, although expressly enjoined in other treatises.

Complainant to be interrogated previous to summons being issued.

2. "A king should thus interrogate a person coming before him, at a proper time, in a respectful attitude, saying: "Fear not, O man, but disclose by whom, where, when, and from what cause, your grievance arises†." He should then, in conjunction with Brahmins and his assessors, deliberate on the representation thus made; and should it appear reasonable, he shall deliver to him (the complainant) a summons,

* Cited in the *Veeramitrodaya*, *Vyavaharāmāyāc'ha*, *Mūdhaviya*, *Smṛitisāra*, *Smṛitichandricā*, *Dṛeṣṭacalica*, *Vivādachandra*.

† *Cat'yāyana*, cited in the *Smṛitichandricā*, *Caṭpalaru*, *Vyavahārāmāyāc'ha*, and *Mūdhaviya*.

or depute an officer for the purpose of citing the adverse party*.”

3. “A sick person, a minor, an old man, one surrounded with difficulties, or occupied with religious ceremonies, or those whose absence would be detrimental to their interests, or who are in distress, (*i. e.* who are afflicted for the loss of their or his beloved object,) or engaged in the affairs of government, or in the celebration of a festival, should not be summoned. The king should not summon one intoxicated, deranged, or idiotic, or persons in grief, or servants, or those who are dependant†.”

Who should not be summoned.

4. “Nor a young woman who is without her husband, nor any woman born of a noble family, nor one lately delivered, nor a damsel of the highest tribè. These are termed dependant on their relations‡.”

Further exceptions.

5. “But women whose families are dependant on them, profligates and harlots, those who are expelled from their family, or degraded, may be summoned §.”

Who may be summoned.

6. “Having ascertained the time, place, and comparative importance of the charge, the king may summon even those who are sick, [causing them to be conveyed] slowly in

Those exempted may be summoned in certain instances.

* *Catyáyana*, cited in the *Vyavaháramayúe'ha*.

† *Catyáyana*, cited in the *Vyavaháramayúe'ha*, and in the *Smritichandricá* as the text of *Harceta*.

‡ *Catyáyana*, cited in the *Vyavaháramayúe'ha*, *Smritichandricá*, &c.

§ *Ibid.*

a carriage*.” “ Having inquired into the complaint, the king may mildly summon those who have absconded into forests†.”

Of arrest. 7. The legality of arrest is also inferrible from the context. It has been described by *Nāreda*: “ A person being about to prefer a claim, may arrest his adversary evading it, or not giving satisfaction in the matter, until the arrival of the summons‡.”

Arrest four-fold. 8. “ Arrest is four-fold: local, temporary, inhibition from travelling, or from pursuing a particular occupation; and the person under such arrests must not break them§.”

Of breaking arrest. 9. “ One who being arrested at a proper time breaks his arrest, is to be fined, and one arresting improperly is liable to penalty||.”

Improper arrest. 10. “ No culpability attaches to him who breaks an arrest put upon him while crossing a river, or place difficult of access, or while in an inhospitable country, or otherwise in

Exemptions for arrest. perilous circumstances.” “ One desirous of celebrating his nuptials, afflicted with disease, about to perform a sacrifice, surrounded by difficulties, sued by another party, transacting the affairs of government, cowherds while in the act of

* *Catyayana*, cited in the *Vyavahāramayūc'ha*.

† *Harceta*, cited in the *Smṛitichandricā*.

‡ *Nāreda*, but *Menu* in the *Smṛitichandricā*.

§ *Nāreda*.

|| *Nāreda*.

tending their cattle, husbandmen in the act of cultivation, artisans engaged in their trades, soldiers engaged in warfare, are not to be arrested by the party, nor summoned by the king*."

11. Arrest signifies detention by order of authority.

Meaning of the term.

12. Those who are sick and the rest [the other exempted persons] may depute a son and so forth, a relation or other friend. Such persons cannot be charged with officiousness, as described in the following text of *Nāreda*: "He is guilty of officiousness, who is neither the brother, the father, the son, nor the constituted agent [of the party]; should he interfere, he is liable to amercement†."

Sick and other exempted persons may appear by deputy.

SECTION 4.

Of the Declaration ‡.

1. When the adversary shall be brought in by means of a summons, order, or king's officer, it is next propounded what is to be done. "The declaration of the complainant, as represented by him, should be written in presence of his

Method of recording the declaration.

* *Nāreda*, cited in the *Vivadatandava*, *Vyavahāramayac'ha*, *Smritichintāmani*, and *Veeramitrodaya*.

† *Nāreda*, cited in the *Vivadatandava*, *Vyavahāramayac'ha*, *Veeramitrodaya*, *Smritichintāmani*, and *Vivādārnavaśetu*.

‡ In the Hindu law, the same term which signifies a judicial proceeding generally, applies both to civil actions and criminal prosecutions; and as the method of conducting the investigation is in both cases the same, it will be necessary to use the terms "charge," "declaration," &c. with reference to the subject matter.

adversary, distinguished by the year, month, fortnight, day, time, tribe, &c*."

Declaration
what to con-
tain.

2. What is declared or alleged^{is} is the thing to be proved. The person declaring or alleging is the plaintiff, or the complainant. His adversary is the defendant, or party complained against. "*Should be written in his presence:*" before his face. "*As represented:*" in the same manner as the statement was made at the time of making the first representation; not otherwise, for if there is any variation, it may prove fatal to the cause†.

Causes of
nonsuit.

3. A prevaricator, one who needlessly attempts to vitiate the proceedings, one who does not adduce his evidence, one standing mute, and one who being summoned absconds, are five persons who are to be nonsuited.

Reasons for a
second record of
the complaint.

4. As the statement of the complainant was taken down in writing at the time of making the original representation,

* *Yājñyavalkya*, cited in the *Deepacalidā*, *Veeramitrodaya*, *Smritichandriā*, *Vyavahāramayuc'ha*, *Vivādatandava*, *Mādhaviya*, *Smritisāra*, and by *Apārāditya*, *Vishwarūpa*, &c.

† Formerly, all actions (in the Common Pleas, at least, then the common court for determining civil suits between subject and subject) were commenced by original writ. This original writ contained, pretty much at length, the nature of the injury which the plaintiff had sustained. Upon this, processes of different kinds, adapted to the species of the original writ which the plaintiff had made use of, were sued out, directed to the sheriff of the county where the defendant resided, to cause him to come into court; and then the plaintiff was to make his declaration, which was nothing more than an exposition of the original writ, enlarged by a specification of *time* and *place* and other circumstances, but

it would seem superfluous to enjoin that they should be again written ; but at the second writing more particulars are mentioned, as of the year, month, fortnight, day, moon's age, and day of the week, name of the complainant and of his adversary, their tribes, whether Brahminical or the like.

5. By the term, other particulars, is meant the quality, quantity, time, place, motive of forbearance, &c. as has been stated : " That is termed a charge or declaration which is significant, technically precise, comprehensive, unconfused, direct, unequivocal, conformable to the original complaint, probable, uncontradictory, clear, susceptible of proof, concise, not deficient, not at variance with respect to place and time, comprising the year, season, month, fortnight, day, hour, country, situation, place, neighbourhood, the complaint and its nature, the tribe, appearance, and age of the adverse party, the dimensions and quantity of the property in dispute, the names of the complainant and his adversary, the names of their respective ancestors, and of the ruling kings, the motives of forbearance, the grievance done, and the names of the original acquirer and grantor*."

Further particulars to be comprized in the declaration.

6. All this being represented to the king, is termed the declaration or charge. At the time of originally preferring the complaint, the subject only is stated ; and before the adversary, the particulars of the year, month, date, &c. are

Difference between the first complaint and the declaration.

so as not to vary materially from the writ, which if it did, would have made the writ, and consequently the suit founded thereon, ineffectual and nugatory.—*Summary Treatise on Pleading.*

* *Catáyana*, cited in *Smritichintámáni*, and *Vivádatandava*, *Vyavaháramayac'há*.

inserted. This constitutes the difference [between the original complaint and the declaration].

Cases in which the date should be specified.

7. Although the specification of the year is not requisite in all cases, yet in the instance of pledge, acceptance, purchase, and sale, it is indispensable to the decision, as appears from the following text: "In the case of a pledge, gift, or sale, the prior transaction has the greater validity*." In mercantile transactions also, if a person had received in a certain year, a certain quantity of a certain article which he restored, and in another year he had received precisely the same article, and of the same quantity from the same person, and if being sued, he should admit the receipt, but plead restoration, it would be necessary for the plaintiff to rejoin, that the restoration was of that article delivered in the former year. The month, and so forth, also should be specified.

Cases in which local circumstances should be specified.

8. The specification of the country, the local circumstances, spot, &c. as well as of time, is requisite in cases of immoveable property, as appears from the following text: "The country, place, site, tribe, name, neighbourhood, dimensions, nature of the soil, the names of ancestors and of the former kings: these ten should be specified in a suit for immoveable property†." •

* Quotation from an uncertain author in the *Vivádatandava*, *Veeramitrodaya*, *Vyavahāramatrica*, and *Vivádachandra*; but from *Yājñavalkya* in the *Mitācsharā* and *Smritisāra*; and the reading of the text is different by several authors.

† *Catýáyana*, cited in the *Smritichandricā*, *Calpataru*, and *Smritichintāmani*; but an unnamed author in the *Vivádatandava* and *Vyavahāramayac'hā*.

9. "*The country*:" central region, and so forth, or otherwise. "*Place*:" city of Benares or the like. "*Site*:" the houses or lands by which the property is bounded on all sides. "*Tribe*:" the order of the parties, whether Brahminical or other. "*The name*:" as *Devadutta*, or the like. "*The neighbourhood*:" the persons who reside in the vicinity. "*The dimensions*," in *beegahs* or other land measure. "*Nature of the soil*:" rice fields, plantation of betel-nut, muddy or clayey soil. "*The names of ancestors*," and "*of the former kings*:" the designations of the ancestors of the parties, and also of the former reigning powers. By prescribing the specification of the year, month, &c. it is only intended, that the dates should be inserted as far as may be requisite in particular cases.

Explanation
of the text.

10. The above being the requisites of a declaration, it follows, that, if it is deficient in any of these requisites, it becomes merely the semblance of a declaration. This semblance of a declaration has not been separately defined by the venerable author, but by others it has been accurately defined: "Declarations should be rejected as mere semblances, which are absurd, uninjurious, unmeaning, frivolous, unsusceptible of proof, at variance with possibility*."

Semblance of
a declaration.

11. *Unnatural*†:" as, Such a person has taken the horn of my hare, and will not restore it. "*Uninjurious*:" as,

Explanation
of the preceding
text.

* *Catáyana* in the *Smritichandrica*, *Mādhaviya*, *Vyavahāramātrica*, but *Nāreda* in the *Smritisāra*, and uncertain in the *Vivādatandava*, *Vyavahāramayūc'ha* and *Vivādachandra*, and *Vrihaspati* in the *Smritichintāmani*.

† The following illustrations may seem frivolous; but other systems descend to similar *minutiæ*. For instance. A condition precedent of which the subject is an event physically impossible at the time of enter-

Such a person transacts business in his own house by the light of a lamp which burns in mine. “*Unmeaning*,” [not having any signification:] as, the unmeaning connection of letters. “*Frivolous* :” as, This *Devadutta* warbles a sweet song near my house. “*Unsusceptible of proof* :” as, *Devadutta* ridicules me by a supercilious look : as this cannot be proved, it is termed, unsusceptible of proof ; from the momentary nature of the action, no witnesses can be procured ; much less written evidence ; and from the trifling nature of the complaint, an ordeal cannot be resorted to. “*At variance with possibility* :” as, This dumb man cursed me : or at variance with local interests : “ That complaint which is prohibited by the government, or detrimental to the interests of a city or country, or to the different classes of society, is pronounced to be inadmissible*.”

A declaration is admissible, though involving many matters.

12. But the text, “ A declaration comprising several distinct subjects is inadmissible†,” is not intended to vitiate a

ing into the contract, renders the contract null, if it refer to an act to be done : and is itself null, leaving the obligation pure and simple, if it refer to the act as not to be done. Thus if a man make a promise or a grant under a condition that the grantee do scale the sky, touch the moon, draw a triangle without angles, travel over Britain in an hour, go from Westminster to Rome in a day, the promise or grant is void. But one made upon condition that he do not scale the sky, nor touch the moon, &c. is valid and unconditional, the condition being nugatory.—*Colebrooke, Obligations and Contracts*, Book 3, §§ 203.

* *Nāreda* cited in the *Smritisarā*, but *Vrihaspati* in the *Smritichintāmaṇi*, *Mādhaveeya*, *Veeramitrodaya*, and uncertain in the *Vivādātandava*, *Vyavahāramayūcha* and *Vivādachandra*.

† Quotation from *Nāreda* in the *Vivādātandava*, but from *Catyāyana* in the *Mādhaveeya*, *Smitrichandricā*, *Calpataru*, and uncertain in the *Vyavahāramayūcha*, *Smritidāra*, and *Vivādachandra*.

claim involving many distinct articles : for instance, if a man should sue another for taking his gold, cloths, silver, &c. there is no error in the declaration. Nor should it be alleged, that a declaration involving a claim of debt combined with other topics is invalid : as for instance, if one should alledge, " Such a one has borrowed silver money from me at interest ; gold has been deposited with him, and my field has been usurped by him." Such a declaration is good. All that is intended is to invalidate a simultaneous investigation. " It being ascertained, that in a judicial proceeding there are allegations of various matters, the king being desirous of investigating the merits, may enter upon them at pleasure*." Hence the meaning of a declaration involving many topics being inadmissible, is, that they should not be entered upon all at once.

13. The term plaintiff or complainant includes the sons and grandsons of those persons, their interests being equally involved ; so also is a constituted agent included, because his appointment creates in him a similar interest, as appears from the following text : " A person being appointed by the plaintiff or complainant, or deputed by the defendant, or person complained against, who acts on behalf of his principal, suffers defeat or success†." The principal participates in the success or failure of his representative.

The term plaintiff or complainant includes their sons, grandsons and agents.

* Cited in the *Vyavahāramayāc'ha*, *Smritisāra*, *Mādhaveeya*, *Vivāda-chandra*, and *Veeramitrodaya*.

† *Nāreda*, cited in the *Vyavahāramayāc'ha*, *Smritichintāmani*, *Calpataru*, *Smritisāra*, but *Catyāyana* in the *Smritichandrić*.

Mode of recording the declaration.

14. This (the declaration) having been written on the ground, or on a board with chalk, is to be corrected by the rejection of superfluities, and afterwards recorded on a leaf, as appears from the following text of *Catyáyana*: “ The judge shall cause to be taken down the spontaneous statement of the plaintiff or complainant on a board with chalk, and afterwards, being corrected, on a leaf *.”

Corrections may be made until the answer is given in.

15. The declaration may be amended until the answer is given in, but not afterwards, lest there should be infiniteness. Hence the text of *Nāreda*: “ He may amend his declaration until the answer is given in ; but being stopped by the answer, the corrections must cease †.”

Answer must not be taken before the declaration has been amended.

16. If the judges cause the answer to be given in before the declaration is amended, they incur the penalty prescribed for anger and avarice ; and the king must investigate the claim, after having obtained a fresh declaration.

SECTION 5.

Of the Answer.

Answer to be written.

1. What is to be done after the amended declaration has been recorded, is next propounded: “ The answer of the party who has heard the declaration must be written down in the presence of the plaintiff ‡.”

* Cited in the *Vyavahāramayūc'ha*, *Smritichintāmani*, *Dipacalica*, *Mādhaveeya*, *Vyavahāramatrica*.

† Cited in the *Vivādatandava*, *Vyavahāramayūc'ha*, *Mādhaveeya*, *Vivā-dārnavaśetu*, *Vivādachandra*, but *Catyáyana* in the *Smritisāra*.

‡ *Yājñawalkya*, cited in the *Vivādatandava*, *Vyavahāramayūc'ha*, *Smritichintāmani*, and *Smritisāra*.

2. The adverse party having heard the substance of the declaration, his answer, or that which follows the declaration, is to be written down in the presence of the plaintiff, that is, the claimant or complainant. Explanation.

3. That which is calculated to refute the first statement is an answer, as appears from the following text: "The wise have held that to be an answer which embraces the declaration, which is solid, clear, consistent, and obvious *." Requisites of an answer.

4. "*Which embraces the declaration :*" capable of refuting it. "*Solid :*" not inconsistent with reason. "*Clear :*" not admitting of doubt. "*Consistent :*" agreeing in all its parts. "*Obvious :*" that which needs not the explanation which would be required by the use of uncommon words, or by ungrammatical terminations or collocation of words, or by the use of elliptical phrases or of a foreign dialect. Such has been termed a true answer †. Further explanation.

* *Nāreda* (not found in his Institutes) cited in the *Vivādatandava*, *Vyavahāramayūc'ha*, *Smṛitichintāmaṇi*, *Smṛitisāra*, *Vivādārnavasetu*, *Vivādachandra*, *Veeramitrodaya*, *Calpataru*, and *Prajapati* in the *Smṛitichandrica* and *Mādhaveeya*.

† The conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally, *mutatis mutandis*, with regard to other parts of pleading,) are, 1st. That it be single, and containing only one matter ; for duplicity begets confusion. But by stat. 4. and 5. Anne, c. 16, a man with leave of court may plead two or more distinct matters or single pleas. 2d. That it be direct and positive, and not argumentative. 3d. That it have convenient certainty of time, place, and persons. 4th. That it answer the plaintiff's allegations in every material point. 5th. That it be so pleaded as to be capable of trial."—Law Dic. Art. Pleading.

Four kinds
of answer.

5. An answer is fourfold, a confession, a denial, a special plea, and plea of former judgment, as *Catyáyana* has declared: "A confession, a denial, a special plea, and a plea of former judgment, are four sorts of answer *."

Nature of
confession.

6. A confession is exemplified as follows. The plaintiff declares, "This person is indebted to me in a hundred pieces of silver," and the other replies, "It is true, I do owe him that sum," as *Catyáyana* has said: "The admission of a claim is termed a confession †."

Of denial.

7. A denial is thus, "I do not owe him," as *Catyáyana* declares: "In law that answer is termed a denial, when the defendant or accused contradicts the charge or declaration ‡."

Denial is
fourfold.

8. The answer by denial is fourfold, "total contradiction, plea of ignorance, of *alibi*, and of non-existence at the period of the alleged transaction §."

* Cited in the *Vivádatandava*, &c. and *Náreda* in the *Calpataru*.

† *Vyasa*, cited in the *Vivádachintámani* and *Veeramitrodaya*, but uncertain in the *Vivádatandava*.

‡ *Smritichintámani*, *Vivádatandava*, *Smritisára*, *Vivádárnavaśetu*, *Vivádachandra*, *Smritichandricā*, *Vrihaspati* in the *Calpataru*, and *Mádhaveya*, *Náreda* in the *Vyavaháratatva*.

§ *Catyáyana*, in the *Vyavaháramayic'ha*, *Vivádatandava*, *Smritichandrica*; *Náreda*, in the *Smritichintámani* and *Smritisára*; *Vyasa*, in the *Calpataru* and *Vivádamatrica*; *Prajapati*, in the *Mádhaveya*; but uncertain in the *Vivádachandra*.

9. "A special plea," is, where the defendant admits the demand, but avoids it by pleading a general acquittance, or that he had received the money as a present, as *Nāreda* has said : "Where an adversary admits a claim adduced in writing by a complainant, but avoids it by some specific circumstance, that is called a special plea*."

Nature of a special plea.

10. "The plea of former judgment," is, when the adversary asserts that the complainant had formerly made a complaint against him in the same matter which was dismissed, as *Catyáyana* has said : "One against whom a judgment had formerly been given, if he bring forward the matter again, must be answered by a plea of former judgment†."

Of plea of former judgment.

11. These being considered as the component parts of an answer, it follows that an answer not comprizing these requisites is a mere semblance. This is a natural inference, but in other law tracts it has been expressly declared : "That is not an answer which is dubious, not to the point, too confined, too extensive, or not embracing all the parts of the declaration. That which is relative to other matter, incomplete, obscure, confused, not obvious, or absurd, is a faulty answer‡."

Semblance of an answer.

* Cited in the *Vyavahāramayūc'ha*, *Vivādatandava*, *Smritisāra*, *Smritichandricā*, *Veeramitrodaya*, *Vivādarnavasetu*, and *Vivādachandra* ; but *Vrihaspati* in the *Mūdhaveeya*, or both according to the citation in the *Calpataru*.

† Cited in the *Smritichintāmani*, *Vyavahāramayūc'ha*, *Vivādatandava*, *Smritisāra*, *Vivādārnavasetu*, and *Vivādachandra* ; but *Vrihaspati*, in the *Calpataru* and *Mūdhaveeya*.

‡ *Nāreda*, in the *Smritichintāmani* and *Vivādatandava*, but uncertain in the *Vyavahāramayūc'ha*.

Explanation. 12. "A *dubious* answer" is thus exemplified : as if in an action for debt, the plaintiff demanding 100 *suvernas**, the defendant should admit that he is indebted in the sum of 100 *suvernas* or 100 *mashas*. "Not to the point:" as if in an action for debt of 100 *suvernas*, the defendant should reply by admitting a debt of 100 *panas*. "Too confined:" as if in an action for debt of 100 *suvernas*, the defendant should answer by admitting that he owes five. "Too extensive:" as if in an action for 100 *suvernas*, the defendant should reply by admitting a debt of 200. "Not embracing all the parts of the declaration:" as if in an action for gold, cloths, and other articles, the defendant should reply by merely admitting the debt of the gold, but of nothing else. "Which is relative to other matter:" as if in an action for debt of 100 *suvernas*, the defendant should answer that he had been assaulted by the plaintiff. "Incomplete:" not embracing the particulars of country, place, and so forth ; as if in an action to recover a certain field, the declaration should specify it as being situated in the central province to the eastward of the city of Benares, and the defendant in answer should admit generally having taken possession of a field, without specification. "Obscure:" as if in an action for 100 *suvernas*, the defendant should answer, Am I alone in debt to this man? which might signify that the chief judge, the assessors, or the plaintiff, were indebted to another person. "Confused:" contradictory in its parts: as if in an action for a debt of 100 *suvernas*, the defendant should answer that he received the money, but that he does not owe it. "Not obvious:" requiring explana-

* A weight of gold equal to sixteen *mashas*, which at five *ruttees* to each *masha*, makes the *suverna* equal to about 176 grains Troy.

tion, in consequence of the use of ungrammatical composition, or collocation, or of a foreign dialect: as if a person being sued for a debt incurred by his father to the amount of 100 *suvernas*, should answer, "By the information of the receiver of the hundred of my father, I know nothing of the *suvernas*:" instead of saying, I did not learn from my father that he received the 100 *suvernas*. "Absurd:" contrary to reason and common sense: as if in an action for debt, the plaintiff should claim the sum of 100 *suvernas* alleged to have been lent out at interest, stating that he had received the interest, but not the principal, and the defendant should answer that he had paid the interest, but had not received the principal.

13. By using the term answer in the singular number, it follows that a confusion of pleas is inadmissible. "That answer which confesses to a part, specially excepts to a part, and denies a part, is not a proper answer, from its confusion*." The above is a text of *Catyáyana*, who has propounded the reason why such answer is improper: "In one suit, the proof cannot rest on both parties, nor can both obtain judgment, nor can two answers be offered at once†."

Confusion of
pleas inadmis-
sible.

14. But it might be contended, that in an answer involving denial and a special exception, the proof would rest with both parties; for as it has been recorded, that "in the case of a total contradiction, the proof rests with the complainant,

Case of a de-
nial and special
exception.

* Cited in the *Sm ritichandricā*, *Vyavahāramayūc'ha*, *Vivādatandava*, and *Veeramitrodāya*.

† Ibid.

and in the case of a special exception, with his adversary*.” Both pleas, however, cannot be admitted in one case: as if in an action for debt of 100 *suvernas*, and also of 100 rupees, the defendant should deny the first claim, and specially except with regard to the second.

Case of a former judgment and special exception.

15. On the other hand, in the case of an answer involving a special exception and a former judgment, the defendant must substantiate both pleas, as has been said: “The proof rests with a defendant pleading a former judgment and a special exception†.” As if one should say, I received the gold, but returned it; and as to the silver, I was sued in a former action, and judgment was given against the plaintiff. But this is incompatible, because the first plea must be substantiated by the decree and the adjudicants, and the second by witnesses and documents.

Case of an answer involving three or four pleas.

16. An answer involving three pleas is now to be considered: as if in an action to recover 100 *suvernas*, 100 rupees, and cloths, the defendant should deny the first claim, plead an acquittance as to the second, and former judgment as to the cloths; and so with an answer involving four pleas. These, when brought forward all at once, constitute no answer.

Must be taken separately.

17. But as the several counts cannot be answered without their respective pleas, these must be urged separately in succession.

* *Nāreda* in the *Vyavahāramayūc’ha*, but uncertain in the *Vivādatandava* and *Mādhaveeya*.

† *Vyasā* and *Hareeta* in the *Vyavahāramayūc’ha*, but uncertain in the *Vivādatandava* and *Vivādachandrica*.

18. Their order will be regulated by the inclination of the parties and the judges; but in the case of two pleas coming together, that which is most important should first be acted upon, proceeding afterwards to that which is less important.

The most weighty plea should be first examined.

19. But where there is a confession in conjunction with another plea, issue is to be taken on that other plea, because there is not proof required to a confession, as *Hareeta* has declared: "If it should be asked, Which plea is to be first considered, when there is a junction of a total denial and a special plea, or of a confession with another plea? the reply is, that which is most important, or which is most material to the decision of the suit, is to be taken as a distinct answer, or else otherwise*:" that is to say, where there is no distinction, the order is regulated by the inclination of the parties.

Confession to be acted on after all other pleas.

20. The meaning of "that which is most important" is next propounded. In an action to recover one *suvernas*, 100 rupees, and cloths, if the defendant should confess the first claim, totally deny the second, and plead a release for the third, here the total denial, from its being the most important, being acted upon by taking the plaintiff's proof, the investigation must proceed. The third plea regarding the cloths follows next. The same order is to be preserved in the case of its junction with a denial, or a plea of former judgment, or a special exception: as if in a suit of the nature

The term "most important plea," means that which is followed by most proceedings.

* Cited in the *Smritichandricā*, *Mādhaveeya*, *Vyavahāramayūc'ha*, *Vivādatandava*, and *Smritisāra*. He and *Vyāsa* in the *Vyavahāramayūc'ha*; but uncertain in the *Vivādachandra*; and *Vyāsa* in the *Calpataru*.

above specified, the defendant should confess the debt of the gold and silver, and declare himself willing to repay it, but should deny with respect to the cloths, or should plead restoration of them, or that judgment was given against the plaintiff in a former action for them; here, although the confession involves the most weighty matter in dispute, yet as it is followed by no adducement of evidence, the denial or other pleas are first to be considered in the investigation of the suit.

In a case of two pleas applying to one and the same count, proof rests with the defendant.

21. But in a case where two pleas apply to one and the same charge, as if a person should arraign another, alleging that he had lost at a certain time a certain cow belonging to him, which had subsequently been found in the house of the other, and the defendant should assert that the allegation is false, and that the cow was in his house previously to the period mentioned by the plaintiff, or that it had been born in his (the defendant's) house. This should not be called a faulty answer, because it is calculated to rebut the charge: it is not a simple denial, as it involves a justification; nor is it a special exception, as it does not admit any part of the allegation; but it is an exculpatory negation, and the proof rests with the defendant, in conformity to the rule prescribing that the proof of justification depends on the defendant.

And not with the plaintiff.

22. But if it be objected, that this might as well be alleged to be the business of the plaintiff, as is prescribed in cases of denial, it is answered, that the rule in question relates only to cases of simple denial. Should it be rejoined, that it might as well be affirmed that the rule prescribing

the proof to rest with the defendant, also relates only to a simple special exception, the answer is, that this is incorrect, as a special plea involves a denial, and there is no such thing as a simple special plea.

23. In general, a special plea consists partly of admission, and partly of denial; as for instance, an admission of the receipt of 100 rupees, but succeeded by a plea neutralizing the admission: but in the instance above quoted there is no partial admission, which constitutes the distinction. This has been clearly stated by *Hareeta*: "When an answer involves a denial and a special plea, the special plea is to be first considered*."

Distinction between an exculpatory negation and a simple denial.

24. Where the pleas of denial and former judgment apply to the whole matter charged, there also the proof rests with the defendant; as in an action for the recovery of 100 rupees, if he should deny, and at the same time plead former judgment; as appears from the following text: "In the junction of a denial with a special plea or former judgment, the defendant should adduce the proof†." There is no such thing as a pure plea of former judgment, for this would be no answer.

Proof rests with the defendant, in pleading denial and former judgment.

25. But a confession is a good answer by itself, because by establishing the truth of the matter adduced to be proved, it excludes the necessity of proving it.

A confession is a good answer.

* Cited in the *Mādhaveya* and *Smritichandricā*, but *Vyāsa* in the *Calpataru*.

† *Hareeta* and *Vyāsa* cited in the *Vṛjavalāramayuc'ha*, but uncertain in the *Vivādatandava* and *Vivādachandra*.

In a case of special plea and a plea of former judgment, defendant may select his own plea.

26. And where there is a junction of a special plea and of a plea of former judgment, as if a person being sued by another for a hundred pieces of money, should reply by an admission of the receipt, a plea of redelivery, and a plea of former judgment, it is optional with the defendant, [that is, it is optional with him which of the two pleas he will proceed first to substantiate.]

Both parties not to plead at once.

27. But in no instance can two adverse parties plead at the same time in one cause.

SECTION 6.

Of the Onus Probandi and Judgment.

On delivery of answer, evidence shall instantly be adduced.

1. The establishment of the claim being dependant on evidence, it is propounded by whom that evidence is to be adduced. "The claimant shall immediately reduce to writing the evidence of the thing to be proved*." After the answer, the claimant, that is to say, he who has the matter to prove, shall reduce to writing immediately, without any interval, the evidence, or that by which the matter is to be proved. From the injunction of its being immediately reduced to writing, it may be inferred, that in furnishing an answer, delay is occasionally allowed: this point will be subsequently considered. The meaning appears to be, that, as the necessity of proceeding without delay was not prescribed in the case of giving in the answer, as it has been in the case of recording the evidence, time is occasionally allowed in pre-

* *Yājñyavalkya*, cited in the *Smṛitichandricā*, *Vyavahāramayūc'ha*, *Mādhavēya*, *Dīpākalīca*, and *Subodhini*; and by *Mitramisra*, *Viśvarūpa*, and *Balambhatta*.

paring the answer to the claim on the principle of "*expressio unius est exclusio alterius*."

2. From the direction that the claimant shall reduce to writing, &c. it follows, that he is to write down the evidence of the matter adduced who has any thing to prove : hence, when former judgment is pleaded, as this is the matter to be proved, he who adduces that plea is the claimant. He (the defendant) therefore is considered as the claimant, and he must adduce the evidence. In a special exception also, as this is the thing to be proved, he who adduces that plea is the claimant, and he is the person to adduce the evidence.

In case of a former judgment or special plea, the defendant adduces proof.

3. But in a case of total denial, the plaintiff is the claimant, and it rests therefore with him to adduce the evidence : hence, by the use of the expression " the claimant shall reduce to writing," it is meant, that he who has any thing to prove, is to do so, and not any other person.

In a total denial, the plaintiff.

4. Therefore, in a confession, as there is nothing to be proved, and neither of the parties have any claim, there is no evidence to be adduced, and the proceeding rests there, as has been clearly expressed by *Hareeta* : " When a special exception and former judgment are pleaded, the defendant shall adduce the proof : in a total denial, the plaintiff : in a confession, there is no issue*."

In case of a confession, no evidence requisite.

5. " That being right, he obtains judgment ; and otherwise, the reverse†." " That " means proof, consisting of docu-

Judgment must be given after adducement of evidence.

* *Vyāsa* in the *Calpataru*, and in the *Vyavahāramayuc'ha* as the text of *Vyāsa* and *Hareeta*, but uncertain in the *Vivādatandava* and *Vivāda-chandra*.

† This is the latter hemistich of a text of *Yājñyavalkya* cited in the

ments, testimony, &c. as will be subsequently explained. That is, by the establishment of the accuracy of his evidence, whether oral or documentary, a party obtains judgment, consisting in the success of his claim. He obtains the reverse, or defeat, consisting in the loss of his claim, if it should happen otherwise.

SECTION 7.

Recapitulation.

Recapitulation.

1. Having propounded summarily the nature of judicial proceedings, the author concludes the subject by a recapitulation: "This judicial proceeding, exhibited relatively to causes in general, consists of four parts*." The judicial proceeding here alluded to (identical with those which the king is enjoined to investigate) is exhibited or explained as being divided into four parts, relatively to causes in general, whether actions for debt or others.

Quadruple division of a judicial proceeding.

2. "The declaration of the complainant should be written in the presence of his adversary." This is termed the first division, or "the declaration." "The answer of the party who has heard the declaration must be written down in the presence of the complainant." This is the second division, and is called the answer. "The claimant shall immediately reduce to writing the evidence of the thing to be proved." This is the third division, and is termed the proof. "That being right, he obtains judgment; and otherwise, the reverse." This is the fourth division, and is termed the judg-

Smṛitichintāmaṇi, Vivādatandava, Dipacalica, and Subodhini; and by Balambhatta and Mitramisra.

* *Yājñyavalkya*, cited in the *Smṛitichandricā*.

ment, as has been declared, " That is called a judicial proceeding which, in the conflicting interests of mankind, furnishes a decision grounded on law and equity*." " It has four divisions, namely, the declaratory, replicative, probatory, and adjudicative, and is termed quadruple†."

3. But in the case of a confession, as there is no adducement of evidence, and as the claim does not require to be substantiated, there is no issue, and the proceeding has only two divisions.

Exception in case of confession.

4. The deliberation of the judges for the purpose of ascertaining, after the delivery of the answer, to which of the parties the adducement of evidence belongs, does not form a distinct division of the proceeding, not having been propounded as such by the venerable author‡, and not being an act dependant on the parties themselves. Thus is concluded the general introduction to judicial proceedings.

Judicial deliberation, not a distinct division of the proceedings.

* *Mádhaveeya* and *Smritichandricá*.

† *Vyavaháramayúc'ha* and *Smritichandricá*, and by *Aparaditya*.

‡ *Yágyawalkya*.

CHAPTER II.

OF RETORT OR RECRIMINATION.



SECTION 1.

1. Thus having propounded the general introduction to a judicial proceeding, which is common to all, the author proceeds to notice certain distinctions which prevail in particular cases. “A person arraigned, not having cleared himself from the declaration, shall not retort; nor shall a person charge another who is already labouring under a charge, nor shall he introduce any thing foreign to his original complaint*.”

Retort, &c.
prohibited.

2. That with which a person is charged, is the declaration: and the person arraigned, not having cleared or acquitted himself, shall not recriminate or retort on the complainant.

Explanation
of the first part
of the text.

3. But the objection does not apply to a plea of former judgment, as it involves the exoneration of the party complained against, although it is in some measure a retort: hence it is apparent, that the restriction is confined to a retort not having a tendency to refute the charge.

Recrimina-
tory plea per-
mitted, when
exculpatory.

* *Yājñyavalkya*, cited in the *Mādhveya*, *Smritichandricā*, *Smritisāra*, *Dipacalica*, and *Subodhini*; and by *Balambhatta* and *Mītramisra*.

Explanation
of the last part
of the text.

4. Having thus restricted the party complained against, he proceeds to apply some observations to the complainant. A complainant shall not charge another with a matter which has been already charged against him, and of which he has not cleared himself, nor shall he introduce any thing foreign or contrary to what had been alleged at the time of his originally preferring the claim. It is declared, that whatever fact, in whatever manner it may have been represented at the time of preferring the original claim, that same fact should be reduced to writing in the same manner at the time of recording the declaration.

Objection re-
plied to.

5. But [should it be objected,] that by formerly enjoining that the writing in presence of the party complained against must be the same as the original claim, it is consequently superfluous to repeat, that any thing foreign to that which has already been represented should not be introduced; the reply is, that the former text merely enjoins the necessity of recording the same subject as had been stated by the plaintiff at the time of his making the original claim, and not another subject in the same cause; as if the plaintiff, at the time of his preferring the original claim, should have declared that a certain person owed him the sum of 100 rupees with interest, he should not declare in presence of the adverse party at the time of recording the declaration, that the debt consisted of a hundred pieces of cloth with interest.

Distinction
between this
and a former
text.

6. Should he do so, this would be entering on another subject, the penalty of which would be nonsuit and fine. But the text prohibiting the introduction of any thing foreign to the original claim prohibits also the shifting the nature of

the proceeding, even though the subject of the proceeding be the same : as if the plaintiff, at the time of his making the original claim, should declare that another had borrowed 100 rupees from him at interest, and that he would not repay it ; and at the time of recording the declaration, he should charge his adversary with having taken by violence the same sum ; consequently, in the former instance, there is a prohibition against introducing a new subject, and in the latter a prohibition against entering on a new ground of action.

7. This has been clearly defined by *Náreda* : “ That man who forsaking his original claim rests on other grounds, is to be nonsuited by reason of the confusion of his proceedings*.” Text of *Náreda*.

8. One who is nonsuited is to be fined, but he does not therefore forfeit all claim to the subject matter. Consequently the injunction here introduced, “ a person arraigned not having cleared himself,” &c. is merely intended as admonitory to the parties against error, but it does not affect the validity of the original claim. Hence the ordinance subsequently declared, “ The king shall investigate judicial proceedings in a *bonâ fide* manner, divested of inadvertencies†.” Nonsuit does not invalidate the claim.

9. This must be understood as having relation to a civil action ; but in criminal prosecutions an error is fatal to the Difference in the case of a civil action from a criminal prosecution.

* Cited in the *Smritichandricá*, *Tyavaháramayúha*, *Vivádatundava*, *Veeramitrodaya*, *Calpataru*, and *Mádhaveeya*.

† *Yájnyawalkya*, cited in the *Smritichintámáni*, *Vivádatandava*, *Subodhini*, and *Dipacalica* ; and by *Vishwarūpa*, *Mitramisra*, and *Balambhatta*.

cause, as *Nāreda* has declared: "A verbal error is not fatal in civil actions: should it appear in actions brought for seduction, or for debt, or for landed property, the plaintiff is to be amerced, but it does not annul his claim*." The meaning of this is, that in all civil suits, not involving criminal proceedings, a verbal error, or the appearance of inadvertency, is not fatal, or not destructive of the claim; that is to say, the original claim is not rendered void. The example given is an action for seduction, &c.

Error fatal to a criminal prosecution, though not to a civil suit.

10. As in actions for seduction, or for debt, or for landed property, by the appearance of inadvertency, the plaintiff is to be fined, but his original claim is not rendered void, so in all civil actions. From the specification of the term civil actions, it is inferrible, that in the case of a criminal prosecution, error is fatal to the cause. As if a man, at the time of making his original complaint, should assert that he had been kicked on the head, and at the time of recording his charge, should allege that he had received a blow of the fist on his foot. In this case, he is not only to be amerced, but his cause is to be dismissed.

Exception to the rule against recrimination.

11. An exception, however, is propounded to the rule against recrimination previously to the refutation of a charge: "He, the person complained against, may recriminate in charges brought for abuse and assault†."

* Cited in the *Vyavahāramayūc'ha*, *Vivādatandava*, *Mādhaveyya*, and *Veeramitrodaya*.

† *Yājñyavalkya*, cited in the *Vivādatandava*, *Mādhaveyya*, *Smṛitichandricā*, *Dipacalica*, and *Subodhini*, by *Viśvarepa*, *Mitramisra*, and *Balambhatta*.

12. In prosecutions for abuse, whether verbal or personal, and in assaults, that is, attacks committed with poison or with offensive weapons and the like, recrimination being allowable, the person complained against may, without having refuted the charge brought against himself, recriminate his accuser. Explanation.

13. But [should it be objected,] that in this instance it is equally impossible to hear the two allegations at once, because the recrimination involves another complaint; and that it is no answer, because it does not refute the first charge; the reply is, that the recrimination is not used for the sake of trying two different pleas, but for the sake of obtaining a mitigated, or averting a weighty punishment. Objection replied to.

14*. As if a person, being charged with having abused or assaulted another, should plead that the complainant was the first aggressor, a mitigation of punishment might be the consequence, as *Nāreda* has said: "It is a settled rule, that the first aggressor is the chief delinquent. He also is a wrong doer who attacks in the second instance, but the punishment of the first party will be more severe†." But where the parties simultaneously aggress, there is no difference in the punishment, as appears from the following text: "If there can be no distinction found between the parties, and the Example.

* This seems analogous to the plea of *son assault demesne*, in the English law; but from what has preceded, it would appear that the equitable doctrine of *set off*, was not recognized in the Hindu code.

† Cited in the *Vivādatandava*, *Mādhaveeya*, *Smritichandricā*, and *Veeramitrodaya*.

abuse, assault, and violence be simultaneous on the part of both, the punishment of both is to be the same *."

Recapitulation.

15. Although it is impossible to try both allegations at once, yet in charges of assault, &c. recrimination is pertinent; but in actions for debt and the like, it is vain. Having thus propounded the law with respect to the parties, he proceeds to declare the duties of the judges and assessors.

SECTION 2.

Of Mesne Process.

Security to be taken for the satisfaction of the award.

1. "A competent surety must be taken from both parties for the satisfaction of the award†." "Both parties," that is, plaintiff and defendant. "A competent surety," one who stands in the same relation to the affair. A representative must be taken from both parties, from the plaintiff and defendant, "for the satisfaction of the award," for the delivery of the sum, or the fulfilment of the penalty adjudged in all proceedings by the judges and assessors.

In default of security, the parties to be guarded.

2. If this be not practicable, persons must be appointed to guard the parties, who are to provide their daily subsistence, as has been declared by *Catyáyana*: "If a party is unable to furnish a competent surety, he is to be guarded, and at the close of each day is to furnish wages for the service of his guards‡." Thus the rule for taking security

* *Dundaviveca*, *Smritichandricá*, and *Veeramitrodaya*.

† *Yágyavalkya*, cited in the *Vyavaháramayūc'ha*, *Subodhini*, *Vivádatandava*, *Dipacalica*; and by *Viswarāpa*, *Mitramisra*, *Balambhatta*.

‡ Cited in the *Vyavaháramayūc'ha*, *Vivádatandava*, *Veeramitrodaya*, *Dipacalica*, and *Mádhaveya*.

from the litigant parties has been declared, and it remains to shew the object of this measure.

SECTION 3.

Judgment in Actions for Debt.

1. "In the case of a denial, when the claimant proves his allegation, the defendant, being cast, is to pay the amount, and an equal amount to the king. A person bringing a false claim is to discharge twice the amount of his claim*." A denial of the claim alleged by the plaintiff being made by the defendant, and he being cast, or compelled to submission by the witnesses or other evidence, shall pay the amount claimed to the plaintiff, and to the king an equivalent fine as a mulct.

What judgment to be given against defendant, being cast.

2. But if the plaintiff cannot establish his claim, he becomes the false claimant, and hence he is to pay to the king a fine equal to twice the amount claimed; and the same rule obtains in a plea of former judgment or special plea. In these instances, the plaintiff concealing the fact, and being overcome by the defendant, shall pay a fine to the king equivalent to twice the amount obtained; but if the defendant cannot establish his former judgment and special plea, then he is the false claimant, and being overcome by the plaintiff, is to pay to the king a fine equal to double the amount claimed, and the amount claimed to the plaintiff. In a case of confession, there is no fine.

What judgment to be given against a plaintiff failing to establish his claim.

* *Yājñyavalkya*, cited in the *Vivādatandava*, *Veeramitrodaya*, *Smṛitichandricā*, *Dipacalica*, and *Subodhini*, and by *Viśvarūpa*, *Mitrāmisa*, *Balambhatta*.

The text relates only to actions for debt.

3. The text above quoted relates only to actions for debt, because the fines applicable to other cases have been propounded separately; and it is not applicable generally, because in cases where there is no property claimed, it could not apply; and although there is a special provision, "The debtor shall be caused to pay by the king*," &c. which also relates to actions for debt, yet that contains a distinction which will be hereafter treated of.

Or it may be interpreted as extending to other cases.

4. Or the text quoted may be admitted to be applicable to all cases, and thus interpreted:—a denial of the allegation being made by the person against whom it is brought, and he being overcome by the evidence adduced by the complainant, shall pay a fine proportionate to the several causes of action. The connective particle may be used affirmatively, and the term "to the king" may be considered as a mere recital. If the complainant cannot prove his allegation, he becomes a false claimant, and shall pay a fine in money equivalent to twice the fine prescribed for each cause of action. In this instance, as in the former, the same rule obtains in cases of a plea of former judgment and special plea.

SECTION 4.

Special Rule respecting the Answer.

Inference from a former text.

1. From the injunction, that the "claimant shall immediately reduce to writing the evidence of the thing to be

* *Yājñyavalkya*, cited in the *Dipacalica*, *Vivādabhaṅgārṇava*, *Vivādārṇavaśeṭu*, *Mādhaveya*, and *Smṛitichandricā*.

proved*," it may be inferred, that in the delivery of the answer, some delay is permitted.

2. But an exception has been laid down: "In a capital offence, theft, assault, and abuse, [where] a cow [is the cause of action], slander, aggression, women; let him contest immediately†; otherwise, at option." Exception.

3. "*Capital offence*," which signifies an attack upon the person or the like, by means of poison or weapons. "*Theft*," petty larceny. "*Assault and abuse*," attack either on the person or character. Its nature will be subsequently explained. "*A cow*," a milch cow. "*Slander*," an accusation tending to loss of cast. "*Aggression*," an attempt either on life or property. This compound has its termination in the singular number, each of the terms composing it being singular‡. "*Women*," women of family, and slave girls. In the former case, character is involved; in the latter, property. "*Let him contest immediately*." The answer is to be immediately given, and no delay is to be allowed. "*Otherwise*:" in other actions, Explanation of the text.

* *Yājñyavalkya*, cited in the *Dipacalica*, and by *Balambhatta*.

† Ibid.

‡ When two or more words come together, each in the same case, and which, in the usual mode of construction, would be separated by a conjunction equivalent to "and," they may be formed into a compound of the third species called *Dvundua*. There are two modes of forming compounds of this species. In the first mode the compound is considered as many, and the last word is therefore put in the dual or plural number; and in the second mode, the aggregate is considered as *one*, and the last member is, consequently, put in the singular number and neuter gender. Wilkins's Grammar, 569. The passage in the text is an example of the latter species of compound.

delay in delivering the answer has been declared optional with the parties, or with the assessors and judges.

SECTION 5.

Indications of Falsehood.

Indications
of falsehood
enumerated.

1. "One who is constantly shifting his position, licks the corner of his lips, whose forehead sweats, and whose countenance continually changes colour; one whose mouth dries up, and who falters in his speech; who contradicts himself often; one who does not look up, or return an answer; who bites his lips; one who undergoes spontaneous changes, whether mental, verbal, corporeal, or actual; such a person, whether under a charge or giving evidence, is esteemed false*."

Exposition
of the text.

2. "One who undergoes spontaneous changes or alterations," such as are not caused by fear or other passion; "whether mental, verbal, corporeal, or actual, is esteemed false;" whether under a charge or giving evidence.

Further ex-
planation.

3. He then explains those changes particularly. "Who is constantly shifting his position:" who cannot remain in one place. "Who licks the corner of his lips:" who rubs the tip of his tongue about the extremities of his lips. These are actual changes.

Ditto.

4. "Whose forehead sweats:" whose forehead is marked with drops of perspiration. "Whose countenance continually changes colour:" undergoes an alteration in colour

* *Yājñawalkya*, cited in the *Subodhini*, and by *Dīpaṇḍya*, *Aparāditya*, *Mitrāmīra*, *Buambhatta*, *Viśwaraṇḍya*.

from dark to pale. These are corporeal changes. “ *One whose mouth dries up, and who falters in his speech.*” who hesitates, and hardly articulates in his speech. “ *Who contradicts himself often :*” whose words are much at variance with each other. These are verbal changes. “ *One who does not look up, or return an answer :*” one who does not give a direct answer, and who on being looked at does not look a man full in the face. This is a sign of a mental change. “ *One who bites his lips :*” or who contorts them. This also is a corporeal change*.

5. These are declared to establish merely a probability of falsehood: not a certainty, from the difficulty of distinguishing between changes which have a cause, and those which are spontaneous. Should any intelligent man be able to explain the distinction, even this is not a cause of failure. As people do not perform funeral ceremonies on the appearance of the probability of a person's dying: so, in these instances, although it should appear probable that a person will be defeated, still it is not the proximate cause of defeat.

Those symptoms, not certain or fatal to the case.

* The manner and deportment of witnesses is very commonly a principal ground of assent to or dissent from their testimony, and is doubtless a very rational indication of the existence or want of sincerity. That the disposition of the witness will have an influence on his manner is undisputed; the adequate observation of it is, however, a matter requiring the most skilful and judicious discernment; the detection of affected plausibility, and the assistance of constitutional timidity, are objects which respectively import, in an eminent degree, the administration of justice. Appendix to Pothier, p. 256. And in a subsequent place, a passage from Lavater connected with this subject having been quoted, a citation from Halhed's Code of Gentoo Laws is given, descriptive of symptoms similar to those mentioned in the text.

Cases of non-suit and fine.

6. Moreover: "One who on his own authority decides a doubtful cause, one who flies, and one who being summoned stands mute, is to be cast and amerced*." *One who on his own authority, without having recourse to proof: decides, by duress or other means, a doubtful cause: one in which the claim is denied by the debtor, shall be cast and fined. Being sued after having confessed the claim, or after its being proved against him, one who flies or absconds, and being sued and summoned by the king, one who stands mute in the assembly, are also to be cast and amerced.*

Explained.

7. "Whether under a charge or giving evidence, is esteemed false." From this text, it might be inferred that a mere ascertainment of probable defeat was intended. The word "amerced" has been used to preclude that supposition. The word "cast" has been used to obviate the supposition, that such person is only to be amerced, but that he does not incur the forfeiture of his claim†.

SECTION 6.

Of Conflicting Claims.

Case of conflicting claims.

1. When two claimants come into court, and simultaneously prefer a claim: as if one person having obtained a field by gift, and enjoyed it for some time, and then on an emergency goes with his family to another part of the coun-

* *Yājñyavalkya*, cited in the *Dipacalica* and *Subodhini*, and by *Viśvavāpa*, *Balambhatta*, *Aparaditya*, and *Mitramisra*.

† In a former verse, chap. ii. Section 1, §§ 9, there was a provision against the forfeiture of the claim in certain cases. The provision for it here is introduced, to shew that such consequence follows in some instances.

try ; and another individual, having obtained the same field by gift, and enjoyed it for some time, goes abroad, and afterwards both of them returning, come into court simultaneously, each claiming the field : in such a case, which of them is to proceed ? In answer to that, it is stated :

2. “ Both having witnesses, the witnesses of the first claimant are to be adduced. But the first claim being rejected, they will be those of the second claimant*.” “ *Both* :” Both claimants having witnesses, the witnesses of the first claimant are to be examined. By the first claimant is meant, not the man who makes the first claim, but the person who claims the first gift and occupancy.

Who is to proceed.

3. But if the adverse party should admit the assertion, saying, that it is true, but that his adversary sold the field to the king, who gave it to him, or that he had received it as a gift from another, to whom it had been given by his adversary, then from the incapacity of the first claimant to offer proof, his claim being rejected, the witnesses of the second claimant are to be examined. The witnesses of the person who claims the second acquisition and occupancy are in this case to be examined. This is the most correct interpretation.

Exception.

4. It is wrong here to apply the rule, that in case of a denial, the witnesses of the plaintiff, and in the case of a plea of former judgment or special plea, the first claim

General rule not applicable in this instance.

* *Yājñavalkya*, cited by *Viśvarūpa*, *Balambhatta*, and *Mitramisra*, and in the *Subodhini*, *Dipacalica*, *Vivādatandava*, *Vyavahārachintāmaṇi*, and *Smṛitisāra*.

being rejected, the witnesses on the part of the defendant must be examined.

Argument in support of the above opinion.

5. That has been already declared in this, "The claimant shall immediately reduce to writing the evidence of the thing to be proved*," and in the subsequent texts; and there would be a repetition, if such were the meaning. The distinction has been clearly laid down by *Nāreda* in the following texts: "In a denial, the plaintiff is to adduce the evidence: in a special plea, the defendant: and in a plea of former judgment, it is only necessary to produce the decree †." Having recited this text, he proceeds: "Where there are two claimants to one cause of action, and each has witnesses, those of the prior claimant are to be examined‡." This case being distinct from all others, has been provided for specially.

SECTION 7.

Of an Action attended by Wager §.

A wagering party being cast, must make good the fine and wager, beside the claim.

1. "If the claim be attended by wager, the losing party is to be compelled to pay a fine, his wager, and the thing claimed to the plaintiff ¶." If the claim or judicial proceeding be a wagering one, or joined with a wager or stake,

* See Chapter ii. Section 3, verse 1.

† Cited in the *Vyavahārachintāmani*, but *Catyāyana* in the *Smṛitichandricā*.

‡ Cited in the *Vivādatandava*, *Vyavahārachintāmani*, and *Smṛtisāra*.

§ This is not exactly the wager of English law; being in fact nothing more than a simple bet on the part of the litigant using it, that he obtains judgment on his side.

¶ *Yājñavalkya*, cited in the *Subodhini* and *Dipacālīca*, and by *Aparāditya*, *Mitramisra*, *Balambhatta*, and *Viśvarāpa*.

then the party who loses, or is cast in such wagering cause, shall be compelled by the king to pay the fine specified, and the wager made by himself, to the king, and to the plaintiff the property forming the subject of the claim.

2. Where any person, influenced by vehemence, engages in the event of his being cast, to pay a hundred *panas*, and his adversary does not engage at all, there also the cause may be proceeded on.

Wager may be by one party only.

3. Should the event of that cause prove the wagering party to be cast, he shall be made to discharge his wager, together with a fine. But should the other party be cast, he is only to pay the fine, but not the wager; because the distinction has been observed of the wager made by the party himself.

In which case he alone is responsible for it.

4. So, where one party wagers a hundred, and the other fifty; in the event of loss, each party is to discharge his own wager. From the condition expressed, "If the claim be a wagering one," it follows that it may be without wager.

Each party responsible for his own wager.

*

SECTION 8.

Special Rules of Proceeding.

1. "The king shall investigate judicial proceedings in a *bond fide* manner, rejecting ambiguity (*C'hala**) ; but should

Trial to be *bond fide*.

* Fraud (*C'hala*), or perversion and misconstruction, is of three sorts: 1st, verbal misconstruing of what is ambiguous; 2d, perverting in a literal sense what is said in a metaphorical one; 3d, generalizing what is particular.—H. T. Colebrooke, on the Philosophy of the Hindus, Trans. R. A. S. vol. i. p. 117.

the truth not be established according to judicial form, failure ensues*."

Parties must be urged to declare the real facts.

2. Neglecting or casting aside *ambiguity*, or what may have been stated unintentionally, *the king shall investigate or try judicial proceedings in a bonâ fide manner*, according to the real circumstances of the case; and if the facts as they exist in reality be not established or proved according to judicial form, failure ensues, or defeat is the consequence. Therefore it is necessary to proceed according to the real circumstances of the case.

By the judges and assessors.

3. It becomes the judge and assessors to use all means, gentle and other, to induce the parties to declare the truth; in which case a decision may be passed without having recourse to witnesses or other evidence. But as it is impossible in every case to decide agreeably to reality, a decision must be made according to the witnesses or other evidence: this is the alternative.

Two methods of deciding, certain and uncertain.

4. As has been declared: "Two methods have been propounded, the one certain, the other uncertain. Certain, is where the real facts of the case are represented; uncertain, is where the facts are doubtfully stated†." A proceeding carried on in the certain mode is the primary one, but the

* *Yājñyavalkya*, cited in the *Subodhini* and *Dipacalica*, *Vishwarūpa*, *Balambhatta*, *Aparaditya*, *Mitramisra*.

† *Yājñyavalkya*, cited by *Aparaditya*, *Balambhatta*, and in the *Vivādatandava*.

uncertain mode is secondary, because a decision passed on the faith of written proof and witnesses may be sometimes correct and sometimes otherwise, for witnesses and other evidence may be false.

5. "Should the truth not be established according to judicial form, failure ensues." An example is now given of this latter part of the text. "In a denial of more than one written claim, if confuted in a part, he shall be made to pay by the king the whole amount of the claim; but that which has not been represented should not be received*."

Proof of a part, when the whole claim is denied, is proof of the whole.

6. In a written allegation, comprising more than one, or several claims for gold, silver and cloths, for instance, should the defendant deny or disallow the whole: if confuted, or forced to an admission by witnesses or other evidence in a part of the claim, the gold, for instance, the king shall cause him to make good to the plaintiff the whole, comprising the silver and the other articles specified. But "that which has not been represented should not be received:" that thing which has not been mentioned at the time of making the first representation must not be received; as if the plaintiff should assert that he had forgotten a certain article, his assertion must not be received or attended to by the king.

Explanation.

7. This is not merely an express precept; because the defendant is proved to have been false in one instance, and therefore it is presumable that he is false in another; and be-

Rule not merely express, but deducible from reasoning.

* *Yājñavalkya*, cited by *Balanṣhatta*, *Viśvarāpa*, *Mitraniśra*, *Aparāditya*, and *Sulapani*.

cause the plaintiff is proved to have been true in one instance, and therefore it is presumable that he is true in another. The text of the contemplative sage is thus associated with the result of inference, or in other words, probability.

A decision founded on inference being erroneous, no blame attaches.

8. A decision being passed according to reasoning and express law, should it not be conformable to the real merits of the case, the judicial officers are not blameable, as *Goutama* has declared : " Inference is the mode of discovering the truth : relying on that, therefore, let a conclusion be formed. He then proceeds to declare, " that the king and his officers are exonerated from blame" [in such cases*.]

Erroneous supposition noticed.

9. This rule respecting a person who has been confuted in part, must not be interpreted simply to imply the rejection of the defendant's statement ; because it expressly declares, that the king shall cause a person who is confuted in part to make good the whole.

Text of *Cat. yiyana* has a special meaning.

10. *Catyáyana* says : " In an action comprising many claims, the creditor shall recover that property only to which he can establish his claim by witnesses or other evidence†." This text relates to the discharge, by the son or other heirs, of debts contracted by the father or ancestor.

To which the above rule does not apply.

11. In this instance, if several claims be preferred against a son or other heir, and he plead ignorance, he is not a denying party ; and if confuted in part, he does not incur the impu-

* Cited in the *Vivádatandava*.

† Ibid. And in the *Vyavahárachintamani* and *Vivádárnavasetu*.

tation of falsehood. Hence, the text concerning a denial in the case of several written claims, does not here apply, from the absence of denial, and the consequent absence of the required inference.

12. Therefore the latter text of *Catyáyana* must be considered generally operative in a plea of ignorance, exclusive of the particular ordinance concerning a denial.

Catyáyana's
text refers to a
plea of igno-
rance.

13. "In all actions for debt, and other actions, approaching to certainty*, if more or less be proved, the claim is not fully established†." This is declared by *Ātyáyana* : which means, that a part only of the claim, or more than the claim being proved, by testimony or other means, the whole is not thereby established. Should this text be adduced in opposition, and should it be argued, that the proof of one part of the claim cannot in any case establish that part which is not proved, the answer is, that although the meaning of the text is, that by reason of the necessity of proving the whole claim, the proof of a part or of more by the witnesses adduced does not establish the whole which is to be proved, still from the use of the terms "*not fully established*," the meaning is, that a doubt remains, and that recourse must be had to other proof. This also is warranted by the text, "rejecting ambiguity ‡".

Should the
evidence prove
more or less
than the claim,
recourse may
be had to other
proof.

* "*Sthirapryeshoo*, approaching to certainty." Proof in a case of seduction or the like is dependant on evidence, &c. resting on tokens or other weak grounds; therefore, in such cases there is uncertainty. But in cases of debt and the like, the proof depending on evidence resting on strong grounds, these cases are approaching to certainty. *Subhodhini*.

† Cited in the *Vīramitrodaya*, *Smṛitichandricā*, and *Vivādatandwa*.

‡ Section 2, §§ 1.

In criminal prosecutions, proof of a part is sufficient for the whole.

14. But in criminal prosecutions, if part of the charge be proved by witnesses adduced to establish the whole charge, in this case the whole charge is proved, because this alone is sufficient proof in such prosecutions, as appears from the following text of *Catyâyana* : " In cases of adultery and theft, the whole charge is proved, should the witnesses adduced depose to the truth of any part of it*."



Disquisition as to the mode of proceeding when two sacred texts differ.

15. But [should it be objected], that " In a denial of more than one written claim," &c. is one sacred text, and " In an action comprising many claims," &c. is another sacred text ; —that here no authority can attach to either, from their opposition to each other, and their being mutually conflicting ; and that they cannot be reconciled by applying them to different subjects ;—it is answered, that " when two sacred texts oppose each other, that which is most applicable has most weight†." Where two sacred texts contradict each other, the contradiction must be rejected by referring them severally ; and that which is applicable, by general or particular inference or otherwise‡, has most weight or authority. Should it be asked how this applicability is to be made apparent ; it is answered, by experience, by ancient experience, showing the relation between cause and effect §.

* Cited in the *Vīramitrodaya*, *Smṛitichandricā*, and *Vivādārnavaśetu*.

† *Yājñyavalkya*, quoted by *Sulapāni*, *Balamhhatta*, &c.

‡ *Ātsurgapubādāde*, *lukshuna*, by general or particular inference.* The exception supersedes the general rule ; and this is the method of construing the universal and special rules : " or otherwise," applicable or not so, by reason of its being appropriate or the reverse to the subject matter. *Subodhini*.

§ In logic, *Anvaya* and *Vyatireka* : the first is the relation of events, of which whenever one occurs, the other also occurs ; the second is the

16. Moreover, in the instance in question, it is proper to apply the rules severally, and in all instances, it is optional to refer rules according to their applicability to particular cases.

To be referred severally.

17. A special exception is propounded to the general rule respecting conflicting authorities: "It is a fixed rule, that the sacred code is of greater authority than the rule of ethics*." Ethical codes, such as those compiled by *Usana-sa* and others, indeed, having been already excluded by the text "conformably to the sacred code of laws†," it follows that the ethical rules here meant are those which treat of the duty of kings, and are included in the sacred code. Where the sacred and ethical codes are at variance, the former is more authoritative than the latter: this is the established rule or definition.

Exception in favour of the sacred code.

18. Although there is no essential discrepancy between the sacred and ethical codes, owing to their conjoint operation; yet, from the superiority of the subject of religious duty, and the inferiority of the moral code, the sacred code is of greater authority: this is the meaning. The superiority of spiritual matters has been exhibited in the commencement of the work‡. Therefore, when the sacred and ethical codes oppose each other, the latter must give way, and it is not optional to refer them severally.

Superiority of the sacred to the ethical code.

connexion of circumstances, of which when one occurs not, the other also does not occur. Note to Dig. vol i. p. 9.

* *Yājñawalkya*, quoted by *Sulapani*, *Balambhatta*, &c.

† Chap. 1. p. 1. §§ 2.

‡ In the first chapter of religious duties and ceremonies.

Certain texts though apparently at variance, not examples of the above rule.

19. What is the example ? "A man may unhesitatingly kill a spiritual teacher, or a child, or an old man, or a learned priest, coming with an hostile intent*." There is no guilt at all imputable to the slayer of a person coming with an hostile intent, whether overt or concealed ; for wrath meets wrath†." "Let a man in battle strive to destroy a person coming with an hostile intent, even though he may have studied the whole *Vedānta* : by such an act he does not become the murderer of a Brahmin‡." These are specimens of moral rules. "Having slain a Brahmin unwittingly, such is the prescribed expiation ; but there is no expiation permitted to one who wilfully kills a Brahmin§." These and others are texts of the sacred code. But these extracts should not be quoted as conflicting instances of the sacred and ethical codes, where the former should be held to prevail over the latter.

Because the ethical rules are corroborative merely of the sacred text.

20. For as these two do not apply to the same subject, there is no opposition, and consequently no room to assign relative superiority. "A man may unhesitatingly kill a spiritual teacher, or a child, or an old man." &c. These and the other texts have been merely recited in corroboration of the following texts, commencing, "A Brahmin may take up arms in defence of religion." "In self-defence, and in defence of sacrificial apparatus, in war, and in guarding Brah-

* *Menu* and *Vishnu* in the *Vivādārnavasū* ; but uncertain in the *Vīramitrodaya*.

† Uncertain in the *Vīramitrodaya* ; but *Cullucabhatta* says, it is the text of *Menu*.

‡ *Catyañana* in the *Vivādārnavasū*, *Vīramitrodaya*.

§ *Menu*, cited by *Cullucabhatta*, &c.

mins or women, one who lawfully kills another is not culpable*." In defence of oneself, in defence of sacrificial apparatus, or articles requisite to the performance of sacrificial ceremonies, in battle, one who slays another lawfully with sharp weapons, who slays a person coming with an hostile intent against women or Brahmins, is not punishable.

21. A person may slay a spiritual teacher or others whose persons are exceeding sacred, if they come with an hostile intent. *A fortiori* others. From the occurrence of the word "*or*," in the preceding text, and the word "*even*" in a former one prefixed to "though he may have studied the whole *Vedanta*," it is not intended positively to assert that spiritual teachers and the like may be slain†. This meaning also may be gathered from the text of *Soomuntoo*. "There is no crime in killing any one coming with a hostile intent, except a cow and a Brahmin;" and from the text of *Menu*; "A man must not slay a spiritual teacher, an expounder of science, a father or mother, Brahmins, or cows; all these are sacred ‡.

Text relating to the killing of a brahmin not to be construed literally.

* *Menu*, cited by *Cullucabhatta*, &c.

† The whole of this disquisition is rather obscure. The meaning seems to be this. It was declared that where the provisions of the sacred and ethical codes oppose each other, those of the former are to be adopted to the exclusion of the latter; but it is the object of the author to prove that, in the instances cited, although there is an apparent variance, they are really not inconsistent; that they may both stand, if not construed literally; that the provisions of the ethical code, in these instances, should be considered in an hyperbolic sense, and that the authority to slay wilfully, a Brahmin coming with an hostile intent, is not meant to be taken in its literal sense, but is used as an argument, *a fortiori*, to prove the permission of slaying other hostile aggressors.

‡ *Menu*, cited by *Cullucabhatta* &c.

But as making an exception in their cases.

22. The text, by applying it to the prohibition of slaying spiritual teachers, and the like, coming with an hostile intent, is rendered pertinent, but not otherwise, as the prohibition to destroy is conveyed generally in the Shasters: "There is no crime in killing any one coming with an hostile intent," &c. This text also relates to other than Brahmins and the like.

General definition of hostile aggressors.

23. For, "an incendiary, one who administers poison, one attacking with a murderous weapon, a robber, one who usurps the land, and one who carries off the wife of another, these six are denominated hostile aggressors*." One intent on destroying by sword, poison, or fire, one who has lifted up his hand in imprecation, one who destroys by means of incantations†, a spy upon the king, an adulterer, a seeker out of blemishes; these and others of the like description are to be considered hostile aggressors. Such is the general definition of an hostile aggressor.

Brahmins and other sacred persons, must in no case be wilfully slain.

24. But Brahmins and the like, being hostile aggressors, may be opposed by a person not meditating their destruction, but for the sake of his own preservation. Should they be destroyed unintentionally, a slight expiation must be performed, but the king does not award any punishment. This, then, being the conclusion, it becomes necessary to adduce another text as the example [of opposition between the sacred and ethical codes.]

* Cited in the *Viramitrodaya*, *Vivádárnavasetu*, *Dipucalica*.

† The original has it "by means of the *Athurvaveda*." The *Athurvaveda*, as is well known, contains many forms of imprecation for the destruction of enemies. Ward on the Hindus, vol. i. p. 288.

25. It is now declared : " The acquisition of a friend is more desirable than the acquisition of gold and land. Therefore a man must strenuously endeavour to obtain that*." This is a rule of ethics. But the sacred code declares, that " the king, divested of anger and avarice," &c†. In these two instances there exists some contradiction : for instance, in a regular judicial proceeding, the acquisition of a friend would be accomplished by prejudging the success of one party ; but this would not be conformable to the sacred code, in conformity to which, the success of either party not being prejudged, the acquisition of a friend will be defeated.

Texts exemplifying the above rule.

26. Here then the sacred code is more authoritative than the ethical code ; and *Apastamba* has propounded a heavy penance, where ethical and sacred rules interfere with each other, for the person who inclines to the ethical. The penance endures twelve years.

Penance for preferring the ethical code.

* Uncertain in the *Viramitrodaya*.

† Chap. i. Sec. 1. §§ 2.

CHAPTER III.

OF THE GENERAL NATURE OF EVIDENCE.



SECTION I.

1. It has been said : “ The claimant shall immediately reduce to writing the evidence of the thing to be proved ;” but in anticipation of the question, what is the nature of that evidence ?—

2. “ Evidence is said to consist of written proof, possession, and witnesses. In the absence of all these, one of the divine tests is prescribed*.”

Text cited.
Four sorts of evidence.

3. Evidence is that by which a matter is established or decided. This is two-fold, human and divine : human evidence is three-fold, writings, possession, and witnesses. Such is the opinion of eminent sages. Writings are of two sorts, official and private. The official sort has already been defined† ;

Further division of evidence.

* *Yājñyavalkya*, cited in the *Veeramitrodaya*, *Vyavaharāchintāmaṇi*, *Vivādatandava*, *Vyavahāramayūc'ha*.

† In the first chapter, treating of religious duties and ceremonies, by the following texts of *Yājñyavalkya* :—“ Let a king, having given land or assigned a corrody, cause his gift to be written for the information of good princes who will succeed him.” “ Either on prepared silk, or on a plate of copper, sealed with his own signet. Having described his ancestors and himself.”—*Subodhini*.

the private will be treated of hereafter. Possession implies enjoyment. Witnesses will be treated of hereafter.

Objection against evidence of possession replied to.

4. Should it be admitted, that writings and witnesses, from their being expressed by language, and from their being comprehended in sound*, may be evidence, but at the same time contended, that possession cannot be evidence, [from the absence of this capacity,] it is answered, that possession is proof, when joined to certain qualities : because purchase or other proximate cause of proprietary right may be inferred from conformity†, or deduced from presumption‡ ; and therefore possession is proof, either by inference, or by reason of its not having any independent existence.

In default of other evidence, a divine test to be resorted to.

5. In default of writings and the other two descriptions of evidence, a divine test, the nature and distinctions of which will be treated of hereafter, is propounded as another

* To the due understanding of this, it is necessary to explain, that according to the *Mimāṃsa* philosophy, there are three modes of proof : *Pratyukshu*, or the evidence of the senses ; *Unnoomanu*, or the evidence from inference ; and *Shubdu*, or the evidence from sound.

† *Aryubhicharu*, or conformity, is a term of logic. “ In *Hetwabhasa*, there are five divisions, viz. *Suryubhicharu*, *Viroodhu*, *Sutprutipukshu*, *Usiddhee*, and *Vadhu*. The assignment of a plausible, though false reason to establish a proposition, is called *Hetwabhasa*. Agreement as well as disagreement in locality between the cause and the effect, is *Suvyubhicharu*.” Ward, vol. i. p. 409.

‡ *Arthapati*. This is a mode of reasoning peculiar to the *Mimāṃsa* school of philosophy. Mr. Colebrooke on the Philosophy of the Hindus, observes : “ Presumption, *Arthapati*, is deduction of a matter from that which could not else be. It is the assumption of a thing not itself perceived, but necessarily implied by another which is seen, heard, or proved.”—Trans. R. A. S. p. 445.

species of evidence to be resorted to, with due attention to tribe, place, and time. This fact is ascertained from the text above cited : “ In the absence of all these, a divine test is prescribed* :” and also from the nature of a divine test, and of its proof having been declared in the scriptures†.

6. But when two claimants come simultaneously into court, the one relying on human evidence, the other on a divine test, he who relies on human evidence is to be first heard, as appears from the text of *Atyāyana* : “ When one adduces human evidence, and the other appeals to a divine test, the king will in this instance proceed to examine the human evidence, and will not have recourse to the divine test‡.”

Human evidence is preferable to a divine test.

7. Moreover, where there is human evidence to establish the principal part of a claim, there also recourse must not be had to a divine test : as in the case of a denial of a claim for a debt of one hundred pieces of silver borrowed, with interest, should there be witnesses to prove the delivery, but not the amount of it, or the rate of the interest specified, and the claimant should offer to prove these facts by a divine test, here also, conformably to the rule, “ In a denial of more than one written claim,” &c. a divine test cannot be had recourse to, for the purpose of establishing either the amount of the debt, or the specified interest.

The principal part of a claim being proved by human evidence, recourse should not be had to a divine test.

* See *supra*, §. 2.

† *Having been declared in the scriptures.* Where there is any visible proof, it is improper to have recourse to that which is unseen : and as the nature of the divine test as proof, is contained only in the scriptures, and it is not palpable to the understanding of the world, so long as there is visible proof, invisible evidence should not be resorted to.—*Subodhini*.

‡ Cited in the *Veeraṃitrodaya*, *Vyāhārachintāmaṇi*, *Vivādatandava*, *Smṛitichandricā*, *Vyavahāramadhava*, but *Nārada* in the *Smṛitichintāmaṇi* and *Vyavahāramayūc'ha*.

The same
rule declared
by *Catyáyana*.

8. This has been declared by *Catyáyana* : " Where human evidence is applicable to even only one part of the case, that is to be received in preference. and recourse must not be had to the evidence of those willing to establish the whole case by divine test*."

Divine test
to be resorted to
only in default
of human evi-
dence.

9. But if there be any text ordaining that a divine test must be resorted to in the trial of secret offences, still that applies only to cases where there is no human evidence: and although *Náreda* has propounded the following rule, " In the case of an aggression committed in a desert, in an uninhabited place, at night, or in the interior of a dwelling, and in the case of a denial of a deposit, divine test must be resorted to†," this also is applicable only in default of human evidence. This is the general fixed rule: an exception to it will subsequently be shown.

Exception.

10. " In the investigation of aggressions, or assault and abuse, and in all cases attended with violence committed long ago, the witnesses must be subjected to a divine test‡."

Proof of cus-
tom depends
on writings.

11. Next are propounded certain rules regarding writings and other evidence. " The proof of established custom, among assemblies of townsmen (*puga*), companies of traders (*sreni*), or conventions of different trades (*gunna*), depends on documentary evidence. There neither divine test nor witnesses are available§."

* Cited in the *Veeramitrodaya*, *Vyavaháramayúc'ha*, *Vivádatandava*, *Smritichandricá*.

† Cited in the *Vivádatandava*, *Veeramitrodaya*.

‡ *Vrihaspati*, cited in the *Vivádatandava*, but *Catyáyana* in the *Veeramitrodaya*, *Smritichandricá*, *Vyavahárachintámáni*.

§ *Ibid*.

12. "So also in a case relating to the right of a pathway or road, and in a case of a watercourse, possession affords the weightiest proof. There neither divine test nor witnesses are available*."

In other cases, possession is proof.

12. "In cases relating to the payment or nonpayment of wages being between master and servant, to the nonpayment for an article purchased, or when a dispute arises concerning wagers laid at dice, or with sporting animals; in all these cases the evidence of witnesses must be resorted to, and recourse must not be had to a divine test or to writings†."

In other cases, witnesses.

SECTION 2.

Of Relative Priority.

1. In answer to the question proposed, To which of the two acts will the greater weight attach, when each party adduces evidence undistinguishable in point of preference, the one asserting a prior, and the other a posterior claim? it is declared, "In all other matter, the latest act shall prevail‡."

The posterior act is of most effect in certain cases.

2. "In suits for property generally:" in actions for debt, &c. "The posterior act:" that which is last done, or the later transaction. The posterior act being established, he who asserts it succeeds; and even though the prior act should be established, the assertor on that ground loses his claim.

Explanation.

3. Thus, if one party proves a loan by its delivery, and the other pleads that he owes nothing on account of repayment, here, in these two acts of delivery and repayment, both being established by evidence, the repayment is of the

Example.

* *Catyáyana*, cited in the *Veeramitrodaya*, *Vyavaháráchintámāni*, and *Smṛitichandricā*; but *Vrihaspati* in the *Vivádatandava*.

† *Ibid*.

‡ *Yājñyavalkya*, cited in the *Vivádashangárnava*, *Vivádárnavaśetu*, and *Dayatatva*.

greater weight, and the party who pleads the repayment obtains judgment.

Additional
example.

4. So also, if a person having borrowed one hundred pieces of money at one per cent. should at a subsequent period agree to pay three per cent., and there being evidence to both engagements, that for three per cent. is of the greater weight; from its having occurred at a posterior date, and because, it would be inconsistent with the existence of the first. It has moreover been declared, "A posterior act not superseding a prior one, has no existence."

Excepcion in
cases of mort-
gage, gift, and
sale.

5. An exception to this rule has been propounded: "But in the case of a pledge, a gift, or a sale, the prior contract has the greatest force*." In the three instances of mortgage, &c. the prior act is the more valid: as if a person having mortgaged a piece of land to one person for a valuable consideration, should subsequently mortgage the same piece of land to another for a valuable consideration, the right will be with the first mortgagee, and not with the second. So also in the cases of gift and sale.

Objection
answered.

6. It should not be contended, that as what has been mortgaged to one person cannot be mortgaged to another, on account of the right of the original owner having been divested, and that as the gift or sale of things already given and sold is impracticable, therefore this rule is impertinent; because it is here intended to declare the prior act to be more valid in cases where a person, through delusion or avarice, makes a second mortgage, &c. where he has no right to do so. This rule, therefore, being pertinent, should not be impugned.

* *Yājñavalkya*, cited in the *Vivādabhāṅgārṇava*, *Dāyatātva*, *Vivādātandava*, but *Menu* in the *Vyavahārachintāmaṇi*.

SECTION 3.

Of the Effect of Possession.

1. Previously to shewing how possession is evidence, when coupled with certain qualities, he declares another effect of possession. “He who sees his land possessed by a stranger for twenty years, or his personal estate for ten years, without asserting his own right, loses his property in them*.”

Effect of possession.

2. “*By another:*” by a stranger. “*Observes his land or moveable property enjoyed by another without interfering:*” does not prevent that other from enjoying it by a declaration that it is his own property: such twenty years enjoyment, that is to say, twenty years uninterrupted possession, will be the means of causing loss; and in the case of moveable property, such as elephants and horses, in ten years.

Explanation.

3. But [it may be objected,] that this is inconsistent, as non-interruption cannot destroy proprietary right, non-interruption not having been recognized, either in practice or theory, like gift or sale, to cause a cessation of right, and that, therefore, proprietary right does not accrue from twenty years possession, and that possession, being merely evidence of right, cannot create the thing to be proved; and moreover, that it is not included among the causes of proprietary right, such as inheritance, &c. as detailed in the following text: “An owner is by inheritance, purchase, partition, seizure, or finding. Acceptance is, for a *Brahmin*, an additional mode; conquest for a *Cshetrya*; gain for a *Vaisya* or *Sudra*†.” These eight *Goutama* has declared to

Objection urged to this interpretation.

* *Yājñyavalkya*, cited in the *Vivādatandava*, *Smṛitichandricā*, *Vyavahāramayūc'ha*, *Smṛitisāra*, *Vivādabhangārṇava*.

† *Vivādatandava*.

be causes of right, but he has not enumerated possession. Therefore it is not right to affirm that twenty years possession is a mode of creating proprietary right; and as the causes of inferring right are facts of worldly concern, it is incorrect to infer them solely from a passage of scripture. This point will be amply discussed in the chapter treating of inheritance, but the text of *Goutama* is merely preceptive*.

Additional
reasons for the
objection.

4. Moreover, "He who enjoys without a title, even for many hundred years, the ruler of the earth should inflict on that sinner the punishment of a thief†." To assert, therefore, that simple possession confers a right of property, would be making an assertion contrary to this text: and it should not be contended, that this last text, "He who enjoys without a title," &c. relates to concealed possession, and the first, namely, "He who sees his land possessed by a stranger for twenty years," &c. (§ 1.) refers to open possession, because the text, "He who enjoys without title," &c. has been propounded in both without distinction. *Catyáyana* has propounded the same rule: "In the possession of cattle, male or female slaves, &c. there is no validity either for the [unlawful] taker or his son. This is the established rule‡:" and besides, loss cannot accrue from open possession, because it is not a cause of loss.

Argument
continued.

5. It must not be supposed, that the exception in favour of the greater validity of a prior act with regard to mortgage, gift, and sale, is intended to imply the greater validity of

* In other words, it merely enjoins the duties of the several tribes, and furnishes no proof that the modes of acquiring property are to be ascertained solely by reference to scriptural authority.

† *Nāreda*, cited in the *Vivádatandava*, *Smritichandricá*, *Vyavaháramayū'cha*.

‡ *Vivádachandricá*, *Vivádatandava*, *Vyavaháramayū'cha*.

the posterior act in a case of this description, provided that in this instance of landed property there have been twenty, and in that of personal property ten years possession, because in such acts (mortgages and the like), no subsequent transactions can really take effect. A person is entitled to mortgage, give, or sell his own property, but he has no proprietary right over things already mortgaged, given, or sold. A penalty is propounded for the gift and acceptance of a thing, where there is no ownership. "He who receives a thing which ought not to be given, and he who bestows it, both these are to be punished as thieves, and amerced in the highest penalty*." If this verse were intended as an exception to the general rule in the three cases of mortgages, &c. then the exception propounded in a subsequent text beginning, "Except property connected with pledges, boundaries," &c†. would be irrelevant. Hence it follows, that no loss can accrue on landed or other property.

6. Nor is the remedy lost. By *Nāreda*, a loss of remedy has been mentioned arising from privation (*abhava*) of cause of neglect, not from privation of the property. "The suit does not prosper after the expiration of the limited period, of a person practising indifference, and remaining silent‡." So also has *Menu* : "If he be neither an idiot nor an infant under the full age of fifteen years, and if the chattel be adversely possessed in a place where he may see it, his property in it is extinct by law, and the adverse possessor

Continuation of the argument. The text does not imply loss of remedy.

* See §§ 13.

† *Vivādatandava*, *Veeramitrodava*.

‡ *Nāreda*, cited in the *Vivādatandava*, and in some copies of the *Mitācsharā*.

shall keep it*." The injury to the remedy is here intended, and not to the property. It happens when the possessor replies with this plea : "The plaintiff is neither an idiot, nor a boy, nor a minor. In his presence I enjoyed the property for twenty years without interruption. Had I unjustly got possession of the property, why did he remain passive all the time ? To the truth of this assertion I have many witnesses." In this instance the plaintiff will be unable to rejoin, but the suit of one not able to rejoin may be proceeded on, as appears from the text, "The king shall investigate judicial proceedings in a *bonâ fide* manner, rejecting ambiguity," &c †. This is the correct interpretation.

Continuation
of the argu-
ment.

7. It must not be supposed, that as neither the loss of the right nor of the remedy ensues, the text above quoted merely intends an injunction not to remain passive, as a person looking on and not interfering, might be in danger of losing his remedy ; for had it been merely intended to convey an injunction against remaining passive, it would have been idle to define a period of twenty years, inasmuch as there is no reason to apprehend loss accruing on simple possession for any period within the memory of man. If it should be asserted, that the definite period of twenty years has been used to obviate any objection to the title deed of that time, according to the text of *Catyâyana* : "He who by virtue of any title deed enjoys the property of a competent person for twenty years, the title deed is incontrovertible after that period ‡:" that also is denied, as the capacity

Other con-
structions pro-

* *Menu*, 8. § 147, cited in the *Smritichandricâ*, *Vivâdatandava*.

† *Yājnyawalkya*, cited in the *Smritichandricâ*.

‡ *Vyavahâramâdhava*, *Vivâdatandava*.

of obviating objections to title deeds does not apply even to cases of mortgages, boundaries, and the like, and as such [general construction] would nullify the exception of such cases, as declared in the following texts of *Catyáyana* :—
 “ The ascertained enjoyment of a mortgage for twenty years in virtue of a title deed must be upheld, if such title deed is unexceptionable. After the decision of a boundary dispute, a document defining the boundaries must be granted. Any errors which that contains must be excepted to in the course of twenty years†;” and the same rule applies to ten years possession of personal property.

posed and rejected.

8. The meaning of the text must therefore be declared in a different manner, which is now done. The loss of the profits accruing from the real and personal property is here intended, not the loss of the remedy or of the right; so that the meaning is, that although the rightful owner regains his field after twenty years uninterrupted possession by another, yet he loses the intermediate profits. This interpretation is conformable to the express words of the text, and is inferrible from the fault of the owner in remaining passive.

Right interpretation of text propounded. Loss of profits intended.

14

9. But if the possession had been in his absence, he regains the profits also, as appears from the condition “ *him who observes*,” and if the possession had fallen under his observation, but been contested, as appears from the condition “ *without interfering* :” so also, if the possession had been observed and not contested, but the term of twenty years had not expired, as appears from the word “ *twenty*.”

Possession must be for twenty years observed, and uninterrupted.

* *Vyavaháramádhava, Vivádatandava.*

Where the profits are forthcoming, they are to be restored.

10. It is true, that it may be considered improper to propound a loss of the accruing profits, because the right to them also exists ; but this can only apply where the profits remain essentially *in statu quo* : as for instance, in the case of betel-nut and bread-fruit plantations, if the fruit be forthcoming as well as the trees which yielded it. But where, from the consumption of the produce, there is an essential destruction of the profits, there the right to it also is destroyed*.

Punishment may be inflicted on the unlawful possessor, even after twenty years.

11. "He who enjoys without right for many hundred years, the rulers of the earth should inflict on that sinner the punishment of a thief†." From this text it may be inferred, that, as is the case in cases of theft, the estimated amount of the property (unduly appropriated) should be restored, were it not for the rule declaring loss after twenty years, which is an exception to that text. But even after twenty years, punishment is to be inflicted from the possession being unlawful, and because there is no exception to this part of the text.

Recapitulation.

12. Hence it is established, that from the fault of the owner consisting in his neglect, and from the express words

* This would seem to proceed on the apparently unjust principle of the civil law, which makes a distinction between the borrower for use, and the borrower for consumption, rendering the latter liable in a case where the former is not ; by the rule that *obligatio extinguitur rei debite interitu*." But the Hindu legislator regards the ordinance rather as a rule of positive law, than as the dictate of unfettered equity ; for he proceeds to state, that the estimated value should be restored were it not for the positive exception, which must be reconciled, so that it may not be superfluous.

† Vide *supra*, § 4.

of the text, after the expiration of twenty years he cannot recover the produce consumed; and the same rule applies to personal property enjoyed for ten years.

13. An exception to this rule is now propounded: "Except property (connected with) pledges, boundaries, deposits, and of idiots and minors, and except deposits, and the property of kings, women, and learned students*."

Exception.

14. "*A pledge, and a boundary, and a sealed deposit.*" These being joined form the plural, pledges, boundaries, and sealed deposits. "*An idiot, and a minor.*" These terms being compounded form the dual number, idiots and minors: the property of these two, the property of idiots and minors: pledges, boundaries, sealed deposits, and the property of idiots and minors, except these descriptions of property, that is, pledges, boundaries, deposits, and the property of idiots and minors†. A deposit is that which is committed to the care of another, with a description‡ of its quality or quantity, as has been declared by *Nāreda*: "When a man bails any of his effects to another, in whom he has confidence, and from whom he has no doubt of receiving his pro-

Explanation of the terms in the exception.

* *Vivādatandava, Veeramitrodaya.*

† The disquisition here introduced is connected with grammatical principles, and the rules on which compounds are formed; but there seems to be no occasion for entering minutely into the subject in this place.

‡ This also is the reading of the *Veeramitrodaya*; but according to the *Subodhini*, the reading should be *Aprudurshanena*, "without a description;" as in the opinion of *Viśveśwara*, where there is confidence, the precaution of counting and describing is needless. But the other reading of the text is most approved.

perty again, it is a deposit, which the wise call *Nicshepa*: a deposit under seal is called *Upaniddhi**."

Neglect not
productive of
loss of profits
in mortgage,
&c.

15. In mortgages of land for twenty, and in pledges of personal property for ten years, no loss of profit accrues to one who observes the possession, and does not interfere, from the absence of any fault on the part of such person; because in these instances there is a competent reason for neglect, inasmuch as in the case of mortgage, the very purpose of its being made is to confer possession, and therefore the blame of neglect does not attach.

Nor in the
case of bound-
aries, sealed
and specified
deposits.

16. In the case of boundaries, from their being easily ascertainable by ancient landmarks of chaff, ashes, or other articles, neglect may be permitted; and neglect may be allowed in the case of sealed and specified deposits, because there is a legal prohibition against the enjoyment of them, and if this prohibition be infringed, the profits must be restored with interest.

Nor in the
case of idiots,
and other ex-
empted per-
sons.

17. In the case of idiots and minors, neglect is excusable on account of their idiotism and minority, and in the case of a king, from the pressure of his multifarious occupations; in the case of women, from their ignorance and inexperience; and in the case of learned students, neglect is permitted from their being continually engaged in the duties of study and instruction, and learned disquisitions.

Recapitula-
tion.

18. Hence it follows, that as in the case of pledges and the rest, as there is a method of accounting for neglect as to possession falling under observation, it can never be the cause of the loss of profits.

* *Vyavahāramaync'ha, Veeramitrodaya, Vivādārnnavasetu.*

SECTION 4.

Digression concerning Fines and other Penalties.

1. He next propounds the particular penalties in pledges and other cases. "The king shall cause the usurper of pledges, &c. to restore the property to the rightful owner, and to pay a fine equivalent to the value of that property, or correspondent to his ability*." In the case of mortgages and the rest, down to the case of the property of learned students, he who by virtue of long possession usurps, should be made to restore the property to the rightful owner. This is merely a repetition of a former text, and the rule respecting the payment of a fine equivalent to the value of property usurped, is a positive injunction.

Penalty of usurpation in cases of pledge, and other instances.

2. Where, in the case of usurping lands, houses, &c. an equivalent fine may not be possible, reference must be made to the penalty hereafter propounded for a removal of landmarks and invasion of boundaries. If on account of the great wealth of the usurper, his arrogance would not be subdued by the payment of an equivalent fine, he must be amerced according to his ability. He must be made to pay so much as is sufficient to subdue his arrogance. "It has been declared, that a fine is levied for the purpose of correction, and by that the arrogant must be subdued." Hence it would appear, that the purpose of a fine is entirely penal. But where the offender has not property equivalent to that usurped, he must be amerced in such manner as may subject him to distress.

Cases in which the fine need not be equivalent to the property usurped.

* *Yājñyavalkya*, cited in the *Vivādatandava*.

Penalty to be inflicted on an offending pauper.

3. Where a person is an absolute pauper, corrections must be accomplished by means of reprimand, corporal punishment, &c. So says *Menu* : "First, let him punish by gentle admonition ; afterwards, by harsh reproof ; thirdly, by deprivation of property ; after that, by corporal pain*."

Corporal punishment is tenfold, and must not be inflicted on a Brahmin.

4. Corporal punishment, or that which is inflicted on the person, is declared to be ten-fold, and to apply to all but Brahmins, as *Menu* has declared : "*Menu*, son of the self-existent, has declared ten places of punishment for the three lower tribes, but the person of a Brahmin is inviolable. The parts of generation, the belly, the tongue, the two hands, and fifthly the two feet ; the eye, the nose, both ears, the property, and (other parts of) the body†." It should be observed, that punishment is to be inflicted on the offending member.

Other modes of punishment.

5. The other methods are, an imposition of labour or a commitment to prison, as has been propounded by *Catyañya* : "A person proved to be a pauper should be compelled to work at his proper occupation, and if unable, should, with the exception of Brahmins, be committed to prison‡."

Special punishment for a delinquent Brahmin being a pauper.

6. A Brahmin, being destitute of property, should suffer dismission from office, &c. as *Goutama* has propounded : "Should he be a delinquent, the punishment of dismission from office, of reprimand, of banishment, and of branding,

* *Menu*, 8. 129 ; but *Gautama*, cited in the *Vivádatandava*.

† *Menu*, 8. §§ 124 and 125. cited in the *Vivádatandava*.

‡ *Vivádatandava*.

should be had recourse to*." So also *Nāreda* has said: "Corporal punishment, deprivation of property, banishment, and branding, are the stated punishments. Mutilation is propounded as the punishment for capital offences. These are declared to be the general punishments†." Having premised this, he proceeds: "All these apply to a Brahmin, except the corporal punishment. A Brahmin must not be corporally punished‡."

7. The punishment of ignominious tonsure may be had recourse to, of banishment from the city, of setting a disgraceful mark on the forehead, and of exposing him on an ass. Additional modes of punishment.

8. Particular rules have been specified for branding. Manner of branding.
 "For defilement of his spiritual teacher's bed, the mark of a *vulva*; for drinking spirituous liquors, the mark of a wine-flagon; for theft, the foot of a dog; for the murder of a Brahmin, the figure of a headless man§."

9. But the text of *Apastamba*, directing that a Brahmin should be deprived of vision, must be interpreted to signify, that at the time of banishment from the city, a cloth should be bound round his eyes, and not that his eyes should be extracted, because such an interpretation would be in contradiction to the text of *Menu* and *Goutama*: "But a Brahmin let him only banish||." The person of a Brahmin is inviolable¶. Construction of a text of *Apastamba*.
 ¶ It is needless to expatiate farther on this question.

* *Vivādatandava*.

† *Ibid*.

‡ *Nāreda*, cited in the *Vivādatandava*.

§ *Ibid*.

|| *Menu*, 8. § 123.

¶ *Vyavāharamayūc'ha*.

SECTION 5.

Of Possession without a Title.

A title is stronger evidence than mere recent possession.

1. Possession has been declared to be evidence of right, from its conformity with right. Should it be objected, that possession cannot afford evidence, because mere possession does not conform with right, [it is admitted in reply:] "A title is more powerful evidence than possession unaccompanied by hereditary succession*."

Simple possession is no evidence.

2. A title arises from gift, sale, or other cause of right. That is more powerful or more weighty evidence in the establishment of right, because possession is dependant on a title, as *Náreda* has said: "Possession with a clear title affords evidence; but possession constitutes no evidence, if unaccompanied by a clear title†:" nor is a title of right established from mere possession, because possession of another's property may be obtained by usurpation or other [unjustifiable] means. Hence it has been declared: "He who simply pleads possession, but no title, in consequence of adducing such false possession is to be considered as a thief‡."

Possession is evidence, when accompanied by five conditions.

3. But it is now declared, that possession is evidence when accompanied by the five following conditions,—a title, length of time, continuity, non-interruption, and the knowledge of the adverse party; according to the text, "Possession is fivefold,—titled, long, continuous, uninterrupted, and known to the adverse party§."

* *Yajnyawalkya*, cited in the *Vivádatandava* and *Smritichandricá*.

† *Vivádatandava*, *Smritichandricá*.

‡ *Vivádatandava*.

§ *Vyása*, cited in the *Vivádatandava*; but *Pitámaha* in the *Smritichandricá*, and *Catyáyana* in the *Dáyátútwa*.

4. By propounding an exception in the case of possession accompanied by hereditary succession, it is demonstrated that possession, even independent of a title, may be evidence of right. The connection of the sentence is as follows: A title is weightier evidence than possession, provided that possession is unconfirmed by hereditary succession, that is, the consecutive enjoyment of three ancestors. That again is weightier than a title, because it is independent of a title.

Also when accompanied by hereditary succession.

5. But it must be understood, that it is independent of the production of a title, and not independent of its existence, for its existence is inferrible from that possession.

It affords presumption of a title.

6. The exception in favour of hereditary succession applies to a case beyond the memory of man, and the text showing the superiority of a title intends a case within the memory of man; because in cases falling within the memory of man, as it is practicable to produce a title, if such title is not produced, it is certainly inferrible that it never existed, and consequently, in such cases, the evidence of possession is dependant on the production of a title; but as from the non-production of a title in cases extending beyond the memory of man, it is impossible to be certain of its non-existence, possession accompanied by hereditary succession may be evidence in such cases, independent of the production of a title.

A title is evidence in cases within the memory of man, but beyond such memory possession is sufficient.

7. This has been clearly laid down by *Catyāyana*:
 “In cases falling within the memory of man, possession with a title is admitted as evidence of landed property. In cases extending beyond the memory of man, the hereditary

Text of *Catyāyana* cited in confirmation.

succession of three ancestors^{*} is admitted even without a title*.”

One hundred years defined to be a period within the memory of man.

8. The period of one hundred years is defined to be within the memory of man, from the text, “The age of man extends to one hundred years†.” “Even without a title :” that is to say, where there is no certainty of the non-existence of a title inferrible from its non-production. Therefore possession for upwards of one hundred years, hereditary, uninterrupted, and falling under the observation of the adverse party, confers a right, as it forms a presumption of, from its conformity with, a title‡.

Unauthorized possession even in the second and third generation punishable under certain conditions.

9. But in the case of a period extending even beyond the memory of man, possession is no evidence, if there be traditional proof of the absence of a title. On this is founded the rule, “He who enjoys without right, even for many hundred years, the ruler of the earth should inflict on that sinner the punishment of a thief§.” It must not be supposed from this text, “*He who enjoys,*” &c. from the expression

* *Vivadatandava* and *Smritichandricā*.

† *Vivadatandava*.

‡ Quia vero tempus memoriam excedens quasi infinitum est memorialiter ; ideo ejus temporis silentium ad rei delicturæ conjecturam semper sufficere videbitur, nisi validissimæ sint in contrarium rationes. Bene autem notandum est a prodentioribus jurisconsultis non plane idem esse tempus memoriam excedens cum centenario quanquam sæpe hæc non longe abeunt, quia communis humanæ vitæ terminus sunt anni centum, quod spatium ferme solet ætatis hominum aut γενεᾱς tres efficere ; quas Antiocho Romani objiciebant, cum ostenderent repeti ab eo urbes quas ipse, pater, avus nonquam usurpassent.—Grotius, Lib. 2. Cap. iv. 7.

§ *Nāreda*, cited in the *Vivadatandava* and *Smritichandricā*.

of the singular number, and from the term "*even*," prefixed to the words "*for many hundred years*," that punishment is to be awarded to the first person only who retains possession for a long time without a title, because this would imply that possession without title of the second or third occupant would be good evidence of right ; but this is inadmissible, being contrary to the following text of *Nāreda* : " For the first, gift is a cause ; for an intermediate claimant, possession with a title*, " &c. Hence it follows that the text, "*He who enjoys*," &c. must extend indiscriminately to all cases of unauthorized possession.

10. The text, " That which is held even illegally without an apparent title, by three ancestors and the father, cannot be reclaimed, having been retained by three successive generations†," must be interpreted to signify three successive ancestors, inclusive of the father : but the mention of three successive ancestors evidently alludes to time extending beyond the memory of man. Were it confined to the possession of three consecutive persons, then as the decease of three successive occupants might happen in one year, it would follow that the second year's possession without a title would afford evidence of right ; but this would be contrary to the rule, " In cases falling within the memory of man, possession with a title is admitted as evidence of landed property," (§ 7.) But the text, " That which is held even illegally," &c. means, that if, in a case of illegal possession, the property cannot be reclaimed, it follows *a fortiori* that it cannot be reclaimed where

Possession by three ancestors not sufficient evidence without length of time.

* Section 6. §§ 5.

† *Vivadatandava*, but *Nāreda* in the *Smritichandricā* and *Dāyatatwa*.

there is no certainty of illegality[†]; and the text, "That which is immemorially held with a title by three ancestors, cannot be resumed from its having descended through three generations^{*}," must be interpreted to mean, with an immemorial, or without a demonstrable title, not without the existence of a title; for it has already been declared, that right does not accrue, even from centuries of occupancy, without the existence of a title. Such is the signification of the rule concerning the hereditary succession of three ancestors.

Possession
with an inferri-
ble title is evi-
dence of right.

11. But [should the objection be urged,] that it is irrelevant to declare that in cases falling within the memory of man, possession accompanied by a title is evidence of right; for if the title may be derived from any extrinsic source of evidence, [such as purchase, &c.] then the right must be deducible from that alone, nor can possession be any evidence either of right or title; and if the title is to be inferred from any extrinsic source of evidence, how can possession accompanied by it [by title] afford evidence [of right]? It is replied, continuous possession accompanied by a title derived from other evidence, affords evidence of right at a subsequent period; but a title, such as purchase, &c. though established, unaccompanied by possession, is not evidence of right at a subsequent period, because, in the intermediate time, the right may have become extinct by gift, sale, or other means of transfer. All this is irrefragable[†].

* *Vivadatandava*.

† This seems to correspond with the civilians' notions of the definition of right.

"Some have founded the nature of dominion in the right or power of disposing of it: which is false; because minors, &c. cannot dispose

SECTION 6.

Of a Title without Possession.

1. It has been shown that possession, when accompanied by a title, affords evidence of right ; but lest it should be supposed that a title without possession affords equal proof, it is declared : “ Where there is not the least possession, there a title is not weighty*.” Such is the intent. With whatsoever title there is not the least occupancy, in that title there is no sufficient weight.

Title is not complete without possession.

2. Gift consists in the relinquishment of one’s own right, and the creation of the right of another ; and the creation of another man’s right is completed on that other’s acceptance of the gift, but not otherwise.

Acceptance necessary.

3. Acceptance is made by three means, mental, verbal, or corporeal. Mental acceptance is the determination to appropriate : verbal acceptance is the utterance of the expression, This is mine, or the like ; which is a concrete er-

Acceptance is threefold.

of their estate, and yet in that estate are the proper owners or *domini*. *Non est argumentum, ideo aliquid tuum non esse, quia vendere non potes, quia consumere, quia mutare in deterius, aut melius*. Last of all, I could not describe it by possession alone ; for possession is one thing, and property, or dominion, another. Possession is properly the legal attendant upon dominion. It is something like exerting the act of property, for by it we effectually exclude the seisin of others ; and when we come to claim our own from the occupancy of those whom we conceive to detain or *possess* our property unlawfully, we mean to recover our right of exerting that act I mentioned. Moreover, dominion has its *foundation* only in natural or corporal possession.”—Taylor’s Civil Law, page 477.

* *Catyáyana*, cited in the *Smritichandricá* and *Vivádatandava*.

tainty*: corporeal acceptance is manifold, as by touching. Special injunctions have been issued as to this mode of acceptance. "Let him give the skin of an antelope by holding its tail, a cow in the same manner, an elephant by his foreleg, a horse by his mane, and a slave girl by her head." *Aswalayuna* has also said, "Let him verbally address rational beings, and touch creatures not having the faculty of reason, and female slaves†."

Title to land
incomplete
without possession.

4. The acceptance of gold, cloths, &c. being completed by the ceremony of bestowing water, and falling, therefore, under either of the means, may be designated as a threefold acceptance; but in the case of land, as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some little possession: otherwise the gift, sale, or other transfer is not complete. A title,

* I am not sure that I have correctly rendered the terms "*svikulpika prutyiya*," nor have I been able to obtain any information from the treatises which have hitherto appeared in the English language on the subject of Hindu Dialectics. In the *Bhāṣa-purichheda*, a treatise on logic of the highest celebrity in the *Nyāya* school, the definition is thus given, *nirvikulpiṅkumprukarutade shoonium-sumbundhanuvugahe*, which may be rendered "abstract, divested of properties, unassociated with relations." *Svikulpiṅkum* is the opposite of this, "concrete," or "not abstract." In the instance given, the verbal declaration causes an association, or creates a relation between the receiver and the thing received.

† Uncertain, as cited in the *Vivādatandava*. *Let him verbally &c.*] If the thing to be received be capable of motion and speech, then the receiver should verbally address it, saying, Thou art mine; and the received should say, I am thine. But if the thing to be received be without intelligence, as a cow or the like, or a female slave, though a rational creature, the receiver should merely touch the present. —*Subodhini*.

therefore, without corporeal acceptance, consisting of the enjoyment of the produce, is weaker than a title accompanied by it, or with such corporeal acceptance.

5. But such is the case only, when of these two the priority is undistinguishable; but when it is ascertained which is first in point of date, and which posterior, then the simple prior title affords the stronger evidence; or the interpretation may be as follows: "Evidence is said to consist of documents, possession, and witnesses*." This having been premised as the general rule; the text, "A title is more powerful than possession unaccompanied by hereditary succession," and "Where there is not the least possession, there a title is not sufficient†," have been propounded to point out to which the superiority belongs, where the three descriptions of evidence meet: as for instance, in the case of the first acquirer, if a title be proved by witnesses, it is of greater weight than possession unaccompanied by hereditary succession. Again, possession accompanied by hereditary succession, vested in the fourth descendant, is more weighty than a title proved by documents; but in the case of an intermediate [claimant], a title accompanied with even a small degree of possession is better than a title destitute of possession‡. This has been expressly declared by *Nārada*: "For the first, gift is a cause; for an intermediate [claimant], possession with a title; but long and hereditary possession alone, is also a good cause§."

Possession in some cases more weighty than a title.

* *Cat'yáyana*, cited in the *Smritichandricá*.

† *Veeramitrodaya*.

‡ See Blackstone on this subject, vol. ii. p. 197, note.

§ *Smritichandricá*, *Vivádatandava*.

The first ac-
quirer not
shewing a title
is punishable.

6. "*He who sees his lands possessed by a stranger**," &c. It has been declared, that to one who observes without interference his landed property enjoyed by another for upwards of twenty years, and his personal property for upwards of ten, there will be no restitution of the profits: but lest it should be supposed, that as there is no restitution of the profits, there will consequently be no award of penalty, the following text has been propounded, from which it is inferrible, that the extent of the penalty is to be adapted to the condition of the person and the nature of the evidence: "He by whom a title has been obtained, must produce it when he is impugned, but his son and his grandson need not; for them, possession is more weighty†."

But to avoid
the penalty, his
son need only
prove unin-
terrupted, and
his grandson
hereditary suc-
cession.

7. By whatsoever person a title to landed or other property has been first acquired, that person, when his right to such landed or other property is disputed, must produce and prove his title by documentary evidence of gift or other mode of transfer. From this it is inferred, that a penalty
* attaches to the first acquirer failing to shew his title; but his son, the second incumbent, need not shew his title, but only continually uninterrupted and open possession. Hence it appears, that if he cannot prove a title, no penalty attaches to him; but penalty attaches to him, failing to show possession accompanied by the condition above mentioned. This is established; but his son again, the third incumbent, need not show either a title or possession accompanied by the above-mentioned condition, but only hereditary succession. Hence it appears, that penalty attaches to the third incum-

* *Vide supra*, Sec. 3. § 1.

† *Yājñawalkya*, cited in the *Smṛitichandricā* and *Vyavahāramayāc'ha*.

bent, failing to show hereditary succession, but not failing to show a title or possession accompanied by the above-mentioned condition.

8. Possession alone, then, is more weighty for the second and third; with this distinction, that it is strong in favour of the second, and stronger in favour of the third party. But here also the real meaning is, that although, in the case of all three, from the non-production of a title the property is equally lost, yet there is a difference as to the penalty. It has been declared also: "He by whom the title has been acquired is subject to penalty on failure of producing it, but not his son or his grandsons, though the possession of these two also is forfeited*."

The non-production of a title causes forfeiture to the son and grandson of the first acquirer, but penalty also to the first acquirer.

9. It has been held, that possession beyond the memory of man is good evidence of right, independently of the demonstration of a title. Here an exception to that rule is declared: "He who dies while a claim adduced by another is pending against him, his heir must produce it [the title]. Possession without a title is not in such case an adequate plea†." When an usurper, or other person having a claim made against him, departs this life while the claim is pending, before the final decision of the suit, his son, or other heir must prove his title.

The defendant dying, pending a claim against him, his son must prove his title, possession not being sufficient.

10. In such cases possession without the production of a title, though established by witnesses, does not afford evidence of right, because the plea of possession would not

Because the plea of possession would not have availed the original defendant.

* *Harita*, cited in the *Vyavahāramayuc'ha*.

† *Yājnyavalkya*, cited in the *Smritichandricā* and *Vivādatandava*.

have been available in the original claim. It has also been declared by *Nāreda* : “ The cause of a litigant party dying *pendente lite* must be undertaken by his son. Possession will not decide the suit†.” So that it is an established fact, if a litigant party die while the claim is pending, it is not thereby determined.

† *Yājñawalkya*, cited in the *Vyavahāramayuc'ha*, but uncertain in the *Smṛitichandricā*.

CHAPTER IV.

OF APPEALS AND OTHER MATTERS.



SECTION 1.

1. Although a judicial proceeding may have been decided, it may in some instances be carried farther while the litigant parties are alive ; but in others, the decision is final.

Some cases
appealable,
others not.

2. With a view to elucidate this rule, the relative consequence of judicial tribunals ; assemblies of townsmen [*puga*], and companies of traders [*Sreni*], is next propounded. "Persons specially appointed by the ruler : assemblies of townsmen : companies of traders, and families : these are classed according to their relative consequence, in the investigation of the affairs of men*."

Relative rank
of tribunals
propounded.

3. "*Persons specially appointed by the ruler* : " those expressly nominated by the ruler or king to investigate judicial proceedings, such as are described in the following and other texts : " Persons who are versed in literature, should be appointed assessors of the court†," &c. *Assemblies of towns-*

Exposition of
the text.

* *Veeramitrodaya* and *Smritisāra*.

† *Vida supra*, Chap. i. Sec. 1. § 10.

men: of people of various tribes and various professions sitting in one place, as of villagers or citizens. *Companies of traders*: assemblages of persons of similar or various tribes exercising the same livelihood, as horsedealers, pawn-sellers, weavers, and shoemakers. *Families*: assemblages of cognate relatives, connexions, and kinsmen.

An appeal may be preferred from the decision of a family upwards to persons specially appointed by the ruler.

4. It must be understood, that of these four tribunals, "persons specially appointed by the ruler" and the rest, the first in the order of reading is the most considerable or important. "*Of men*:" of litigants. "*In the investigation of affairs*:" in the administration of justice. This is an established rule. A judicial proceeding having been decided by persons specially appointed by the ruler, if there be dissatisfaction on the part of the litigant fancying himself aggrieved, an appeal cannot be preferred from them to an assembly of townsmen: nor, having been decided by an assembly of townsmen, to a company of traders: nor, having been decided by a company of traders, to a family: but having been decided by a family, an appeal may be preferred to a company of traders, to an assembly of townsmen, and to persons specially appointed by the king.

An appeal may be preferred to the king.

If affirmed, appellant to be amerced; if reversed, judicial authorities to be amerced.

5. It has been declared by *Nāreda*, that after a case has been decided by persons specially appointed by the king, an appeal may be preferred to the king himself, in the following text: "*Families: companies: assemblies: persons specially appointed: the king: these are the tribunals for judicial proceedings, and their relative consequence is in their consecutive order.*" A case on which a wager has been laid on the result, having been appealed to the king, and having been decided by him in council, and in presence

of the authorities who tried the case, the unreasonable appellant must be amerced, if he is cast ; but if he succeeds, the constituted judicial authorities must be amerced.

6. It has been stated, that after decision by the inferior tribunals, a case may be carried farther, and that the decrees of the superior courts are not appealable. Next is propounded an instance, in which the decrees of all authorities are liable to reversal : “ He shall reverse cases decided by compulsion, by fear, by women, at night, in the inside of a house, abroad, and those brought forward by enemies*.” He shall reverse cases decided or terminated by compulsion, or violence, by fear or terror ; so also cases decided by women, at night, or in the night time, though not by females ; in the inside of a house, or in the interior of a dwelling ; abroad or outside of the town ; and cases decided by enemies.

Decisions liable to reversal.

7. Moreover, “ A suit adduced by one intoxicated, or deranged, or diseased, or distressed, or a minor, or terrified, or uninterested, &c, is not valid†.” “ *Intoxicated*,” with spirituous liquors. “ *Deranged* :” disordered in any of the five modes by a prevalence of wind, or of bile, or of phlegm, or under a morbid state of the three humours, or under planetary influence. “ *Diseased* :” by sickness. “ *Distressed* :” distress engendered by the privation of ease and the acquisition of pain. “ *A minor* :” one incompetent, through nonage, to the transaction of his affairs. “ *Terrified* :” by enemies. “ *Uninterested* :” from having no connexion with the

What suits are invalid.

* *Veeramitrodaya, Subodhini, &c.*

† *Ibid.*

matter at issue. The use of the term “&c.” signifies a suit adduced in opposition to usages*, of the town or the realm and the like. It has been established by those versed in judicial proceedings, that the suit of one will not be attended to, when it is in opposition to the usages of the town or realm, as appears from the text : “ That act which is in opposition to the usages of a town or realm, and that act which has been prohibited by the ruling power, have no validity†; and this rule must also be understood relatively to the act of him who has no delegated or natural interest in the suit.

Certain suits improper between what parties.

8. But the text, “ In a dispute between tutor and pupil, father and son, husband and wife, master and slave, a judicial proceeding cannot be entertained‡,” is not intended to exclude them altogether from legal redress, because even between them judicial proceedings are allowable.

A pupil may have redress against his tutor in certain cases.

9. Moreover, “ A pupil must be corrected without chastisement ; but if this be impracticable, recourse must be had to slender rods composed of strings or cane, and the king will punish one using other instruments than these§.” This is a text of *Goutama* : “ by no means on the head, as declared by *Menu*.” From which rules it appears, that if a tutor, impelled by anger, strikes violently, or on the head ; and if the pupil thus treated in an illegal manner, should

* *Veeramitrodaya, Subodhini, &c.*

† *Ibid.*

‡ *Ibid.*

§ *Ibid.*

represent his grievance to the king, a judicial proceeding will be entertained in this case.

10. "The ownership of father and son is the same in land which was acquired by his father*," &c. From this text it appears, that in the case of land acquired by the grandfather, the ownership of father and son is equal : and therefore, if the father make away with the immoveable property so acquired by the grandfather, and if the son have recourse to a court of justice, a judicial proceeding will be entertained between the father and the son.

And a son
against his fa-
ther.

11. "A husband is not liable to make good the property of his wife, taken by him in a famine, or for the performance of a duty, or during illness, or while under restraint." From this text it appears, that if, under other circumstances, the husband make away with his wife's property, and being required to refund, and having assets refuse to do so, then a judicial proceeding may be entertained between husband and wife.

And a wife
against her
husband.

12. On the subject of a hired servant, the cases will be propounded in which judicial proceedings may be entertained between him and his master. "Whichever of these may rescue his master from imminent danger shall be emancipated, and shall receive a son's share of the inheritance." From this text it appears, that there is no bar to the institution of a judicial proceeding by a slave against his master, refusing him emancipation and a share of the inheritance.

And a slave
against his
master.

* *Yājñawalkya*, cited in the *Dāyabhāga*, *Dāyatātva*, *Dāyacramasūgraha*, *Vivādutandava*, *Vivādārnavasetu*, *Vivādabhūgārnavu*, &c.

All such suits
admissible,
though not
credit-able,

13. The import of the text, therefore, "In a dispute between master and pupil," &c. is, that pupils and the like preferring an action, should be advised by the king in court, that such proceedings are not creditable, either really or apparently. But if the pupils or other similar suitors are inflexible, the case must be proceeded on according to the regular form.

Interpretation
of a text of
Nāreda.

14. Notwithstanding the following text of *Nāreda*, "The suit of one against many, of women, and of a servant, is to be rejected: this has been declared by high legal authorities," still a judicial proceeding of one with many on account of the same matter may be entertained, as appears from the following and other texts: "He who usurps the property of many, he who breaks an engagement formed [with many,]" and "him who has been assaulted by many," &c. The meaning must be, that a judicial proceeding cannot be entertained between one and many, on account of divers different matters at the same time.

Certain married women
may sue.

15. Women* also who are independent, such as milk-women and wives of vintners, may institute judicial proceedings. The exception refers to respectable married women whose husbands are alive. From their coverture they cannot sue independently.

* A married woman carrying on trade openly for her own account distinct and separate from the traffic of her husband may, under the French institutions, bind herself by obligations relative to her trade without the sanction and authority of her husband, and subject herself to a personal decree.—Colebrooke on Obligations and Contracts, Part 1. p. 233.

16. The exclusion† of a servant from suing, has reference also to his dependant state, but is not intended to exclude him from instituting a judicial proceeding relative to his own peculiar interests by permission of his master. This is the proper construction.

Servants
may sue for
their own
rights.

† In the Hindu law, as in the Roman jurisprudence, a slave has in general no property exclusively his own, and his contracts are imperfect by reason of his dependance on the will and control of a master. But by his master's indulgence he may have separate and peculiar property, over which he has full power. *Ibid.*

CHAPTER V.

DIGRESSION CONCERNING TROVE AND PLUNDERED PROPERTY.



SECTION 1.

1. Cases which are liable to reversal having been treated of, next is propounded property liable to restoration. "Trove property is to be restored by the king to its owner : but if he fails to identify it, he is to be amerced with an equivalent penalty*."

Trove property to be restored to the owner.

2. Gold or other property, having been lost by the owner and found by tax gatherers, police officers, and such like people, and having been delivered to the king, is to be restored by the king to its rightful owner, if the owner identify it by marks of its quality and quantity ; but if he fail to identify it, he is to be fined in an amount equivalent [to the value of the property claimed], from his having uttered a falsehood.

Explanation of the text.

3. The rule for the restoration of trove property is here specially propounded, because finding has already been enu-

Reason for declaring this rule.

merated among the causes of property, and therefore what is found is property.

Period for which trove property should be kept in deposit.

4. A period of limitation has also been declared: "Trove or waif property having been recovered by tax gatherers or police officers, the rightful owner will recover within the period of one year: after the king will take it*." *Menu* has extended the period of limitation to three years in the following text. "Three years let the king detain the property of which no owner appears, *after a distinct proclamation*: the owner appearing within the three years may take it, but, after that term, the king may confiscate it†." Hence it would appear necessary to keep it in deposit for three years.

Deductions to be made after certain periods.

5. If the rightful owner appear within the year, he will recover the whole. If he appear after the expiration of the year, a sixth is to be deducted as a fee on the deposit, and the residue restored, as has been declared. "The king may take a sixth part of the property so detained by him, or a tenth, or a twelfth, remembering the duty of a good king‡." Whence it is inferrible, that if the owner arrive within the year, the whole is to be restored. If in the second year, a twelfth; in the third, a tenth; and in the fourth and succeeding years, a sixth is to be deducted.

Reward to the finder.

6. The king is to give a fourth of his own share to the finder; but if the owner appear not at all, he is to give a

* *Veeramitrodaya*.

† *Menu* 8. § 30.

‡ *Menu* 8. § 33.

fourth of the whole to the finder, and to take the rest, as has been declared by *Goutama*: "The king is to keep in deposit unclaimed trove property for a year; afterwards a fourth share of it goes to the finder, and to the king the rest*."

7. The use of the word "*year*" here in the singular number is not intended to confine the period to one year, as is evident from the text, "Three years let the king detain the property," &c. (§ 4;) and the conclusion of the text, "after that term, the king may confiscate it," (§ 4,) merely intends that, should the owner not appear within that period, the king is at liberty to use the property after the expiration of such period; but should the owner [subsequently] appear, the king, having deducted his own share, shall restore to him a sum equivalent [to the value of the property consumed].

Period of limitation defined not to annul the owner's right, but to authorize the king to use the property.

8. The rules above recited relate only to gold and similar valuables. But the rules relative to stray cattle will subsequently be propounded under the texts, "He shall give *panas* for an animal with uncloven hoofs," &c.

Rules relative to stray cattle will subsequently be declared.

9. Having thus declared the law relative to trove property, such as gold, &c. found lying on the high road or at toll and police stations, next is propounded the law relative to gold, &c. long buried in the earth, and usually called treasure. "But of a treasure anciently repositied under ground, *which any other subject, or* the king has discovered, the king may lay up half in his treasury, having given

Law relative to hidden treasure.

half to the Brahmins. A learned Brahmin, having found a treasure formerly hidden, may take it without any deduction, since he is the lord of all*." But if it be found by any other person, the king is to keep the whole, giving one sixth to the finder. But not having represented, and being known, the king shall cause him to relinquish the whole, and amerce him†."

Exposition
of the preced-
ing text.

10. The king having found treasure of the nature above described, and having given half of it to Brahmins, will keep the residue in his treasury ; but if a learned Brahmin, that is, a priest versed in scriptural lore and of good conduct, find the treasure, he is to keep the whole, because he is the chief of the whole world: but if the treasure be found by any other than the king or a learned Brahmin, for instance, by an illiterate Brahmin, or by a man of the military tribe, the king, having given a sixth of it to the finder, will keep the residue, as *Vasishtha* has ordained : " Whoever finds property whose owner is unknown, the king will take it, giving to the finder a sixth‡ ;" as *Goutama* has also declared : " Treasure found is the property of the king, excepting [that found by] a learned Brahmin. But any other than such Brahmin finding it, and representing the circumstance, will obtain a sixth §." " *Anibedita*," not having represented.

* *Menu*, chap. 8. § 38 and 37, cited in the *Dáyatatwa*.

† *Menu*, cited in the *Dáyatatwa*, but not found in the *Institutes*.

‡ *Retnácara*, *Smritichandricá*.

§ *Ibid*.

The participle is here in an active signification*, not having represented, "*anibedita*," and having been discovered, "*vignyata*," forms the compound *anibeditavignyata*. Thus whoever has found treasure, and does not represent the circumstance, and is afterwards discovered by the king, is to be made to restore the whole, and to be amerced according to his circumstances.

11. In this case also, if the owner of the treasure appear, and identify his property by description of its quantity and quality, the king shall restore it to him, after having made deductions of a sixth or twelfth part. As *Menu* has declared: "From the man, who shall say with truth, 'This property which has been kept, belongs to me,' the king may take a sixth or twelfth part, for having secured it†." The amount of the deduction is to be regulated by the tribe of the claimant, and the period [expired].

Treasure to be restored to the owner after certain deductions.

12. Plundered property is next treated of. "The king must restore to his subjects property plundered from them; not restoring it, he incurs the sin of the person [from whom it was robbed]‡." Having recovered from the robbers the

The king must restore to his subjects property plundered from them.

* "When णि is affixed to *Dhatos*, which mean knowing, serving, or desiring, or to those with an *Unubhundu* णि, the words formed thereby are active, passive, or containing, and are either in the present or past tense." Carey's Sanscrit Grammar, p. 572. In the instance in the text, the participle is, properly speaking, in the passive form, but being derived from the *Dhatoo* वृत् to know, it may be used in an active signification, agreeably to the above rule.

† *Menu*, 8. § 35.

‡ *Ratnâcara*.

property robbed, it is to be restored to that subject, living within his realm; from whom it was taken; and not restoring it, the sin of the person robbed devolves upon him, and likewise the sin of that theft, as *Menu* has said: "To men of all classes, the king should restore their property which robbers have seized; since a king who takes it for himself, incurs the guilt of a robber*." Property seized by robbers must be restored by the king to men of all classes. The king consuming it himself, incurs the sin of robbery.

Neglect also
culpable.

13. If having recovered it from the robber, he enjoys it himself, he incurs the sin of the person who seized the property; and if he is careless about the plundered property, he incurs the sin of his subject [from whom it was taken].

If plundered
property be not
recovered, its
amount must
be paid from
the royal trea-
sury.

14. If, having used every endeavour, he fail to recover the plundered property, he must refund the amount of it from his treasury; as *Goutama* has declared: "Having recovered property seized by robbers, he must restore it to its right place; or he must pay out of his treasury†." So also *hṛī Crishna Dwaypayana* declared: "If unable to recover the plundered property, by the king so incapable, its amount must be restored out of his own treasury." Having thus propounded both the general and special introduction to

* *Menu*, 8. § 40.

† Formerly there was a clause in the engagements of all landholders and farmers of land, by which they were bound to keep the peace, and in the event of any robbery being committed in their respective estates or farms, to produce both the robbers and the property plundered.

judicial proceedings, debt on loans will next be treated of, as the first of the eighteen titles of law*.

* The next chapter treats of nonpayment of loans (*rinádanum*), comprehending rates of interest, mortgages, &c. but as the introduction of it here would appear inappropriate, and not pertinent to the subject matter, and as it, with other subjects of litigation, has been amply discussed in Mr. Colebrooke's translation of *Juggunnátha's Digest*, I shall proceed at once to the chapter on testimony.

CHAPTER VI.

OF WITNESSES.



SECTION I.

1. It has been declared, that evidence consists of written proof, possession, and witnesses. That of possession has already been defined. The nature of oral evidence is now to be declared. A witness may be either from seeing or hearing, as has been declared by *Menu* : “ Evidence of what has been seen or of what has been heard is admissible.” They are two-fold ; a witness made, and a witness not made : a made witness is one nominated to give testimony : a witness not made is one not so nominated.

Witnesses may be by seeing or hearing, and may be either made or not made.

2. The made witness again is divided into five classes, and the witness not made into six, making in all eleven descriptions, as has been declared by *Nārada* : “ Eleven descriptions of witnesses are recognized by the learned in law, five of which are made, and the remaining six are not made*.” Their distinctions also have been declared by him : “ A witness by record, by memory, by accident, by secrecy, and by corroboration†.” These are the five classes of made witnesses : the nature of the witness by record and the rest has been defined by *Catyañjana*.

Eleven classes of witnesses, five made and six not made.

* *Vivādatanduvā.*

† *Vivādatanduvā* and *Smṛitichandricā.*

Definition of
made witness-
es.

3. "One brought by the claimant himself, and whose name is inserted in the deed, is called a witness by record; a witness by memory is without record*." He also has given an explanation of the witness by memory without record: "The witness who for the purpose of greater publicity having witnessed a transaction has been repeatedly reminded of it by the claimant, is termed the witness by memory†." He who fortuitously arrives at the time of a transaction, and is cited as a witness, is termed a witness by accident. A distinction has been propounded by him between these two descriptions of witnesses, although they are both unrecorded: "Two witnesses for the substantiation of a claim are termed unrecorded, one intentionally brought, and one accidentally coming." "One who standing concealed, is caused to hear distinctly the defendant's words by the claimant, for the purpose of establishing his allegation, is termed a witness by secrecy‡." "One who subsequently confirms the testimony of witnesses, whether his information be mediate or immediate, is termed a witness by corroboration§."

Definition of
witnesses not
made.

4. The six descriptions of witnesses not made have also been defined by *Nāreda*: "A townsman, a judge, a king, one authorized to manage the affairs of the parties, one deputed by the claimant, and (in family disputes) persons of the same

* *Vivādatandava*.

† *Ibid*.

§ *Nāreda*, cited in the *Vivādatandava*.

family are also to be considered witnesses*." Here the term judge is intended to include the scribes and assessors, from this verse: "When a king investigates a suit, the witnesses are declared to be the scribes, judge, and assessors in succession†."

5. He next declares the qualifications and number of witnesses: "Religious, generous, of honourable family, speakers of truth, eminent in virtue, candid, having sons, wealthy, and in number three, are to be considered witnesses: conformers to revealed and written law, according to tribe and order, or all [in the cases of all]‡."

Qualifications and number of witnesses.

6. *Religious*,—addicted to piety. *Generous*,—habituated to making gifts. *Of honourable family*,—descended from a noble stock. *Speakers of truth*,—accustomed to veracity. *Eminent in virtue*,—not preferring their temporal interests. *Candid*,—not deceitful.—*Having sons*, possessed of male offspring. *Wealthy*,—possessing much gold and other property. *Conformers to revealed and written law*,—punctual in the performance of indispensable and enjoined ceremonies. Such persons being three in number, are to be considered witnesses. *Three*,—that is, a number not less than three; there cannot be less than three, but any excess above that number is optional. Such is the meaning. *According to tribe*,—that is, not differing in tribe; tribe, such as the *Moordhabushiktas* and the like, whether in the direct or inverse order. Thus *Moordhabushiktas* are

Explanation of the preceding text.

* *Vivádatandava, Snritichandricá.*

† *Ibid.*

‡ *Yágnavalkya, cited in the Vyavaháramayúe'ha, Vivádatandava.*

witnesses in the cases of *Moordhabushiktas*; so also in the cases of *Ambushthas* and others. This rule obtains also according to the order; that is, not different in order. *Order*,—the *Brahminical* order and the like. Thus *Brahmins* of the qualifications and number above mentioned are witnesses for *Brahmins*, and the same with *Cshetryas* and the rest. So also women should be made the witnesses of women, as *Menu* has said: “Women should regularly be witnesses for women*.” But where they cannot all be procured of the same tribe or order, *Moordhabushiktas* and the rest, and *Brahmins* and the rest, may be made witnesses in the cases of each other.

Incompetent witnesses are of five descriptions.

7. In the absence of witnesses of the description above specified, for the sake of distinguishing others not positively prohibited, it is necessary to define those who are incompetent witnesses. They have been declared by *Náreda* to be of five descriptions: “By those skilled in the law, witnesses who are incompetent have been found to be of five kinds†.”

Reasons of incompetency.

8. “By reason of interdict, of delinquency, of contradiction, of self-appointment, and of intervening decease ‡.”

Those who are incompetent by reason of interdict.

9. Those who are incapacitated by reason of interdict are next stated: “Learned students, religious devotees, superannuated persons, ascetics, and the like, are those incapacitated by interdict; not from any other cause §.” Reli-

* *Menu*, 8. § 68, cited in the *Vivádatandava*.

† *Vivádatandava* and *Smritichandricá*.

‡ *Ibid*.

§ *Ibid*.

gious devotees are *Vanaprasthas*. By the term “and the like,” is meant persons disobedient to their father, &c. as *Sancha* has said: “Persons disobedient to their fathers, residents in the families of their spiritual preceptors, ascetics, inhabitants of the forest, and devotees, are incompetent witnesses*.”

10. Those who are incompetent by reason of delinquency are next treated of: “Thieves, public offenders, irascible persons, gamblers, cheats. These are incompetent from delinquency: there is no truth in them†.” *Irascible persons*,—those subject to anger. *Gamblers*,—those who play with dice. By reason of delinquency.

11. The characteristic of witnesses incompetent from contradiction is next declared by him (*Nārada* :) “Of witnesses recorded and summoned by a litigant party, should one utter a contradiction, all are rendered incompetent by that contradiction‡.” By reason of contradiction.

12. The nature of witnesses incompetent by reason of self-appointment is next set forth. “He who not having been indicated, comes and offers his evidence, is technically called *Seoochee*, or spy.” Such testimony is not available§.” By reason of self-appointment.

13. The description of witnesses incompetent by reason of intervening decease is next given: “How can any person By reason of intervening decease.

* *Vivādatandava* and *Smritichandricā*.

† *Nārada*, cited in the *Smritichandricā*.

‡ *Catyāyana*, cited in the *Vyavahāranayūc'ha*, *Smritichandricā*.

§ *Nārada*, cited in the *Smritichandricā*.

give evidence touching a claim, the nature of it not having been communicated, and the claimant not being in existence? Such a person is an incompetent witness by reason of intervening decease*." The meaning is this : as to what claim or in whose behalf shall the witness depose, the plaintiff or defendant not being in existence, or being dead, the claim not having been preferred, and the nature of it not having been explained by the parties to the witnesses, and they not having been desired to bear witness in the matter? These, then, are incompetent witnesses by reason of intervening decease. †

Exception in cases of evidence after claimant's decease.

14. But when sons or others are instructed by a father or other person at the point of death, or even in health, to give evidence in a certain matter, they may be witnesses after decease, as *Nāreda* has said: "After the death of the claimant, except those instructed by him on the point of death‡." Also, "A witness may give evidence in a matter touching the six species of bailments [the claimant being dead], a just claim having been communicated by one not of unsound mind‡."

Other incompetent witnesses enumerated.

15. Other incompetent witnesses have also been enumerated: "A woman, a minor, an old man, a gamester, an intoxicated person, a madman, an infamous person, an actor, an infidel, a forger, one deformed, degraded from cast, a friend, one interested in the subject matter, a partner, an

* *Nāreda*, cited in the *Smṛitichandricā*.

† Ibid.

‡ Ibid.

enemy, a robber, a public offender, one convicted, an outcast and others, are incompetent witnesses*.”

16. *A woman*,—a term of obvious import. *A minor*,—one who has not attained years of discretion. *An old man*,—one whose age exceeds eighty years. By the term *old*, learned students, and those excepted in other texts are indicated. *A gamester*,—one who plays with dice. *An intoxicated person*,—with liquors and the like. *A madman*,—one under planetary influence. *An infamous person*,—accused of the murder of priests or other similar offences†. *An actor*,—a dancer. *An infidel*,—an atheist or the like. *A forger*,—one who fabricates documents. *One deformed*,—destitute of an ear or other organ. *Degraded from cast*,—a slayer of a Brahmin or other similar criminal. *A friend*,—an intimate. *One interested in the subject matter*,—having an interest in the point contested. *A partner*,—one engaged in the same business. *An enemy*,—a foe. *A robber*,—a thief. *A public offender*,—one relying on his own violence. *One convicted*,—one whose falsehood has been proved. *An outcast*,—one deserted by his relatives.

Explanation of the terms of incompetency.

17. By the term “and others” is indicated those incompetent witnesses who are pointed out in other texts also. Incompetent witnesses, by reason of delinquency; incompetent by reason of contradiction, and by reason of self-appointment and intervenient decease. These, and women,

The text includes other incompetent witnesses formerly prohibited.

* *Yajnyawalkya*, cited in the *Vyavahāramayūc'ha*.

† *Nāreda*, cited in the *Vivādatandava*; but *Yājnyawalkya* in the *Vyavahāramayūc'ha*.

children, and the rest, are incompetent witnesses. Witnesses are to be three in number, but to this rule he propounds an exception.

Exception as to the number of witnesses.

18. "By consent of both parties, even one person of virtuous knowledge may be a witness:" a person of virtuous knowledge signifies, one who, by means of knowledge, performs all the indispensable and enjoined ceremonies; even one such person may be a witness, by the acquiescence of both parties. By virtue of the term *even*, the number two is also included. "*Conformers to revealed and written law.*" By this rule, although it would appear that virtuous knowledge is equally an attribute of three, yet the meaning is, that their evidence is admissible without the consent of the parties, but that the evidence of one or two is not admissible without the consent of the parties; therefore the mention of three is relevant.

Exception as to the qualifications of witnesses.

19. An exception is next propounded to the text "*religious, generous,*" &c. "Every man may be a witness in cases of abduction, robbery, assault and abuse, and a flagrant offence*." The definition of abduction, &c. will subsequently be given. In such cases, all those who are prohibited in texts as destitute of piety and other qualities may be witnesses. But even here, those cannot be witnesses who are incompetent by reason of delinquency, or of contradiction, or of self-appointment; because the reason of incompetency, that is, there being no truth in them, exists here also.

* *Yājñavalkya*, cited in the *Vyavahāramayo'ha*, but uncertain in the *Vivadatandava*.

20. Although from this text it appears, that adultery, theft, and assault* and abuse, rank with flagrant offences, yet as these are committed openly by persons relying on their own violence, separate mention has been made of adultery and the rest, which rather signify offences committed privately. Homicide, robbery, forcible abduction of other men's wives, and assault and abuse, are the four descriptions of flagrant offences*.

Definition
of offences.

21. Next is propounded the deposition of witnesses. "The witnesses should be made to depose, having been placed near to the plaintiff and defendant†:" brought close to the plaintiff and defendant. It appears, from a rule laid down by *Goutama*, that they need not speak when questioned apart. They shall be made to depose in the manner hereafter mentioned. Here *Catyáyana* has propounded a distinction. "The judge, being in the assembly, should calmly interrogate the witnesses, placed near to the plaintiff and defendant. He will inquire their testimony (except in the case of Brahmins) in the presence of the gods and priests‡." In the forenoon, let the judge, being purified, having severally called on the witnesses, being purified also, whose faces are turned either to the north or to the east, interrogate, by the solemnity of repeated adjurations, all being acquainted with the rules of duty and circumstances of the case§."

Mode of tak-
ing depositions.

* *Vivádatandava*.

† *Yágyavalkya*, cited in the *Vivádatandava*.

‡ *Vivádatandava*, *Vyavaháramayac'ha*, and *Smritichandrioá*.

§ *Náreda*, cited in the above authorities.

Mode of adjuring several orders.

22. *Menu* has propounded a rule to be observed in taking the depositions of *Brahmins and others**. "Let the judge cause a priest to swear by his veracity; a soldier by his horse or elephant, and his weapons; a merchant by his kine, grain, and gold; a mechanic or servile man by *imprecating on his own head, if he speak falsely*, all possible crimes†." The meaning is, he shall adjure a *Brahmin* by saying, If you speak falsely, your truth will be destroyed: a *Cshetrya* by saying, Your horse or elephant and weapons will become useless: a *Vaisya*, Your cattle, seeds, and gold will be unproductive: a *Sudra* he shall adjure by saying, If you speak falsely, all sins will be on your head.

Exception in case of certain *Brahmins, Cshetryas, and Vaisyas.*

23. "Regenerate men who tend herds of cattle, who trade, who practise mechanical arts, who profess dancing and singing, who are hired servants or usurers, let the judge exhort, and examine as if they were *Sudras* ‡." The term regenerate men has been used to denote, that those of the military and commercial classes are likewise included in the above text. The term "*who profess singing*," means vocal performers.

Case of witnesses being challenged

24. If the defendant take exception to witnesses, and it be susceptible of visible proof, as in cases of minority, the ex-

* *Menu*, 8. § 102, cited in the *Vivadatandava*, *Smritichandricá*, and *Vyavaháramayúcha*.

† *Menu*, 8. § 113, cited in the *Vivadatandava*, *Vyavaháramayúcha*, but *Náreda* in the *Smritichandricá*. "Sometimes they swore by any thing they made use of, as a fisher by his nets, a soldier by his spear, &c."—Potter's *Antiquities of Greece*, Vol. i. page 293.

‡ *Vivadatandava* and *Smritichandricá*.

ception must be tried by that ; but in cases not susceptible of visible proof, it rests on his (the defendant's) assertion, and on popular report, but not on other witnesses, so that there may be no infiniteness.

25. If a defendant, having taken exception to witnesses, cannot establish it, he is to be amerced according to his ability ; but if he prove it, the witnesses become incompetent, as has been said : “ A person failing to establish an exception openly made against witnesses, should be punished : but if proved, the witnesses are to be dismissed, and deprived of the privilege of testimony*.”

A false challenge punishable.

26. Exceptions having been proved against all the witnesses adduced by the claimant, should he be destitute of other means of proof, he will be defeated ; from the text, “ Should the claimant, relying solely on the veracity of his witness, be defeated, he shall be caused to pay a fine :” and the meaning is, that should he not be destitute [of other means of proof], he may have recourse to additional evidence.

Witnesses being found incompetent, recourse may be had to other means of proof.

27. In reply to the question, How is the adjuration to be urged ? it is stated, “ Those places assigned to offenders and to heinous sinners, and those places assigned to house-burners, and those assigned to the murderers of women and children : he will obtain all those places (of punishment) who

Form of adjuration to be used towards the servile class, and to the regenerate orders following mean occupations.

* *Veeramitrodaya*.

† *Náreda*, cited in the *Vivadatandava* ; but *Catyáyana* in the *Smritichandricá*.

gives false evidence. All the virtues performed by you in hundreds of other worlds will accrue to him whom by your falsehood you have injured." The meaning is, that the admonition is to be as follows. Those places assigned to persons who have committed heinous and grievous sins, to house-burners, and to the murderers of women and children, he will attain who gives false evidence. Moreover, all the virtue practised by you in hundreds of other worlds will accrue to him who has been defeated by means of your falsehood. This must be understood as relating to the servile class, as appears from the words of the text : " But a servile man by all possible crimes." It must be understood also as relating to regenerate men, exercising the business of herdsmen, &c. as appears from the text : " Regenerate men who tend herd of cattle," &c.

The adjuration not to be understood literally.

28. As it is preposterous to suppose the loss of all the virtues practised in many other worlds, and the acquisition of the fruits of grievous offences committed by another, merely from the utterance of a falsehood, it follows that this is declared solely for the purpose of creating awe in the witnesses ; as *Nāreda* has said : " By ancient virtuous texts, and by extolling the pre-eminence of truth, and by denouncing falsehood, he will repeatedly inspire them with awe*."

Penalty for refusal to give evidence after admonition.

29. In answer to the question as to the mode of proceeding when the witnesses, having been admonished, remain mute, " A man not giving evidence will be made to pay the whole debt by the king, together with ten per cent. [on

the amount], after forty-six days*.³ He who having agreed to give evidence, and having been admonished, remains entirely mute, must be caused by the king to pay to the creditor the whole debt with interest, together with a tenth share over and above the debt. This tenth share will belong to the king, as appears from the text: "The debtor must be made by the king to pay a tenth share, over and above the debt proved†;" and this rule must be understood to operate after the expiration of forty-six days. He will not be made to pay it during the interval. It must also be understood as implying the absence of sickness and other calamity, as has been declared by *Menu*: "A man who is unafflicted, who comes not to give evidence, in loans and the like, within three fortnights *after due summons*, shall take upon himself the whole debt, and pay a tenth part of it as a fine to the king‡." The term unafflicted, signifies one free from any calamity (inflicted) by God or the king §.

30. Next is stated the case of a person who, though acquainted (with the nature of the affair), maliciously refuses to accept the office of witness. "That mean person who, though acquainted, does not give evidence, is equal in point of sin and of punishment to false witnesses||." That mean person

Penalty for
refusing to
bear testimony.

* *Yājñyavalkya*, cited in the *Vivādatandava*, *Smṛitichandricā*, and *Vyavahāramayśc'ha*.

† *Veeramitrodaya*, *Retnācara*.

‡ *Menu*, 8. § 107, cited in the *Vivādatandava*, *Smṛitichandricā*.

§ I have here been compelled to differ from the translation of Sir William Jones, see *Menu*, 8. § 107. He has rendered the term *aguda*, "one who labours not under illness;" but this, from the subsequent interpretation, is evidently not sufficiently comprehensive.

|| *Yājñyavalkya*, cited in the above authorities.

who, though fully conversant with the matter in dispute, does not give evidence, or refuses (to become a witness), is equal in point of sin and of punishment to false witnesses. The punishment of false witnesses will subsequently be propounded.

False evidence being detected, the judgment is to be reversed.

31. Having punished the false witnesses, the case must be re-examined; and if the suit be concluded, and false evidence be subsequently detected, the case must be commenced upon *de novo*, as *Menu* has declared: "Whenever false evidence has been given in any suit, the king must reverse the judgment; and whatever has been done, must be considered as undone*."

Mode of proceeding when the evidence is contradictory.

32. Next is propounded the rule in a case where the testimony varies. "In a contradiction, the assertion of the majority; where the numbers are equal, that of the respectable party; where there is contradiction among respectable witnesses, that of the most respectable†." In a case of contradiction or variation, the assertion of the majority must be received. But in a case of contradiction where the numbers are equal, the assertion of the respectable party must be received as evidence; but where there is a variation among respectable persons, the assertion of those who are most respectable must be received, that is, of those who are endued with a knowledge of revealed law, who shape their conduct accordingly, who have children, wealth, and virtuous qualities.

* *Menu*, 8. § 117, cited in the *Vivadatandava* and *Smritichandricā*.

† *Yājñavalkya*, cited in the *Smritichandricā* and *Vyavahāramayūc'ha*.

33. Where respectable witnesses are few, and others are many, there also the assertion of the respectable party is to be received. This is inferrible from the text : " By consent of both parties, even one person of virtuous knowledge may be a witness* ;" which demonstrates the great superiority of good qualities.

Superior respectability prevails over superior numbers.

34. But the former text, " Of witnesses recorded and summoned by a litigant party, should one utter a contradiction, all are rendered incompetent by that contradiction," relates to a case where there is no distinction to be made [among the witnesses] by reason of their being all equal.

Application of a former text.

35. Next is propounded on what depositions of the witnesses, success, and on what defeat, depends. " He will be successful whose witnesses depose to the truth of his statement. But the defeat will certainly be his whose witnesses depose contrariwise†." That party will be successful whose witnesses depose to the truth of his statement, describing the subject matter, its quality and quantity, and saying, We know this to be true. But that party whose witnesses depose contrariwise, in opposition to his statement ; saying, We know this to be false, his will certainly or assuredly be the defeat.

The decision rests on the evidence of the witnesses adduced.

36. But where from a want of recollection of the subject of the claim, the witnesses do not depose either affirmatively or negatively, there the decision must depend on other evi-

Except where the witnesses do not recollect.

* Vide *supra*, § 10.

† *Vivadatundava* and *Smritichandricā*.

dence ; witnesses should not be repeatedly questioned by the king. That assertion which is unpremeditated should be received ; as has been declared : “ That assertion which is unpremeditated and blameless should be received ; and having been made, the witnesses should not be perpetually questioned by the king*.”

Where a claimant's witnesses depose against his claim, he may adduce others to confute their evidence.

37. An exception is next propounded to the rule : “ But the defeat will certainly be his whose witnesses depose contrariwise (§ 35).” “ Evidence having even been given by witnesses, if others who are more respectable, or double in point of number, contradict them, the first deponents will become falsified†.” Evidence having been given by witnesses of the first-mentioned description, designedly contrary to the subject matter of the claim, if others who are more respectable than the former, or double in point of number, contradict them, and depose conformably to the claim, then the former witnesses become falsified or perjured.

Objection replied to.

38. It may be objected, that this is not consistent ; because by going into other proof, after depositions made by witnesses agreed to for the establishing the truth by the parties, the assessors, and the chief of the assembly, there would be the danger of infiniteness, and because it opposes the following text of *Náreda* : “ But after the suit is decided, evidence is fruitless, whether written or oral, if not in the first instance declared : as the efficacy of rain becomes useless after the crops are ripe, so evidence in decided cases is

* *Náreda*, cited in the *Vivádatandava*.

† *Yājñawalkya*, cited in the *Vivádatandava* and *Smritichandricá*.

equally unprofitable*.” To this objection it is replied ; If a claimant, in the course of the investigation, not relying upon as evidence the testimony of those witnesses with whose faults he was not cognizant, from their being on his own side, should, from their testimony being adverse to his claim, take exception to such witnesses, what is there to prevent recourse being had to other proof ?

39. “Of him whose organ is defective, and where there is a fallacy, that is not true knowledge.” In the same manner, as in the case of an eye or other organ, though its defect may not have been proved, yet by reason of there being no certain evidence of the knowledge created by it, from its placing the object in a false light, defect may be inferred. The same reasoning applies here. Moreover, a scrutiny into the testimony of witnesses, as well as a scrutiny into [the character of] the witnesses, has been propounded : “ Let him [the king], together with his assessors, scrutinize the testimony of witnesses.” It has also been propounded by *Catyañana* : “ When the means of proof have been strictly examined, then the testimony must be scrutinized, and he who has been tried by a scrutiny into his testimony is termed scrutinized as to the subject matter†.” This is the rule. The term *kriya*, or proof, signifies the witnesses. When these have been examined by the rule, “ A friend, one interested in the subject matter,” &c. then their testimony must be scrutinized, and the scrutiny into the testimony is for the purpose of establishing the truth of the matter alleged, as ap-

Credibility must be enquired into, after the question of competency has been disposed of.

* *Vivádatandava*.

† *Ibid*.

pears from the text: "Allegations are established by truth." When the proof has been thus scrutinized, and by the scrutiny also of testimony the subject matter alleged has been scrutinized, he (the witness) is termed scrutinized in such case. This is the rule, or the established practice of those acquainted with judicial matters. [So likewise] where there is no defect of organ, preventive of knowledge, the object appears in its true light.

Another objection replied to.

41. Should it be objected, that the claimant cannot have recourse to other means of proof passing over the proof adduced by himself, it is answered, that this is no objection. "Having departed from strong evidence, he who relies on weak evidence cannot recur to the former means of proof, after the decision has been given against him*." From this text of *Catyáyana*, prohibiting recourse to other means of proof after judgment, it is indicated, that recourse may be had to other means of proof prior to judgment; also from the following text of *Náreda*: "But after the suit is decided, evidence is fruitless;" by which it appears, that recourse to other evidence is forbidden only at a time subsequent to the judgment, and not before also. Therefore, evidence having been given by witnesses, recourse may be had to other means of proof by one not content. This is the rule.

What further means of proof may be resorted to, by a claimant not content with his evidence.

42. This being the rule, if persons originally indicated, but not then at hand, more respectable than or double the number of those whose evidence has been taken, be forthcoming, the proof must be made to depend

on those witnesses ; this appears from the text of *Náreda* : “ But after the suit is decided, evidence is fruitless, whether written or oral, if not in the first instance declared.” In default of those originally indicated, witnesses not indicated should be resorted to, not a divine test ; from the text, “ A wise man will reject the evidence of a divine test, if witnesses are procurable :” but if witnesses are not procurable, recourse must be had to divine test, and after this stage no other means of proof can be sought for by a non-content claimant, because there is no rule to that effect. Therefore the proceeding must be here finally determined.

44. But where a defendant takes exception to his witnesses, being not content with the testimony given by them, as operating adversely to his interests ; in such a case, as the liberty of adducing other means of proof has not been extended to a defendant, the purgation of the witnesses must be affected by a delay of seven days for the appearance of calamity *inflicted* by God or the king. And if the exception be established, the witnesses are to be made to pay the debt which was the subject of the action, and are to be amerced according to their abilities. But if the exception be not established, the defendant must rest content.

A defendant not being content with his evidence, cannot resort to other means of proof.

45. As *Menu* has declared : “ The witness who has given evidence, and to whom, within seven days after, a *misfortune* happens *from* disease, fire, or the death of a kinsman*, shall be condemned to pay the debt and a fine.” This rule respecting the case of a non-content defendant must be un-

Text of *Menu* cited.

* *Menu*, 8. § 108.

derstood as being an exception to the general rule, "He will be successful whose witnesses depose to the truth of his statement," &c.

Erroneous
construction
noticed and
refuted.

46. Some have interpreted the rule, "Evidence having even been given by witnesses," &c. to signify, that the witnesses adduced by the claimant having deposed in favour of the claim, if the defendant produce other witnesses more respectable, or double in point of number, to depose contrariwise, then the witnesses of the original claimant will become falsified. But this is erroneous, because the production of evidence on the part of the defendant is [in the first instance] inadmissible. He is called the claimant who affirms the matter to be proved. His adversary, who denies it, is termed the defendant. Moreover, the* proof of a negative is dependant on the establishment of an affirmative, and the establishment of an affirmative is not dependant on the proof of a negative. Therefore the proof of the affirmative only is proper, the nature of a negative not admitting of its being established by witnesses or other evidence; and it is consequently right, therefore, that the claimant only should adduce proof. Moreover, the mode of proceeding is invariably propounded with reference to the nature of the reply, according to the following texts. "When a special plea and former judgment are pleaded, the defendant shall adduce the proof; in a total denial, the plaintiff. In a confession

* "The sixth general rule is: In every issue the affirmative is to be proved. A negative cannot regularly be proved, and, therefore, it is sufficient to deny what is affirmed until it be proved; but when the affirmative is proved, the other side may contest it with opposite proofs."
—Introduction to Morgan's Essay on the Law of Evidence, p. 39.

there is no issue." In one suit, the proof cannot rest on both parties. Therefore the construction, that "if the defendant produce other witnesses more respectable, or double in point of number, to depose contrariwise," &c. is inadmissible.

47. But the opinion [is not correct], that this has been propounded with reference to the following text, "In the case of two claimants in the same matter, both having witnesses, the witnesses of the first claimant must be received;" that is to say, the witnesses of him who made the first representation are to be received; that this rule indicates whose witnesses should be received in the case of two affirmative claimants to the same property, by right of inheritance, without any ascertainable priority or posteriority as to the time of the acquisition, and that the rule, "Evidence having even been given," &c. is an exception to it; that thus the witnesses of prior and posterior claimants being equal in point of number and quality, the witnesses of the prior claimant must be interrogated; but that his adversary's witnesses are to be interrogated where the witnesses of the posterior claimant are greater in point of respectability or double in point of number; that there is not proof of a negative, as both parties assert an affirmative*; and the case being unconnected with the four descriptions of answer, the settled rules of pleading do not apply to the example cited; and, that it is equally allowable to assign two means of proof to both parties, as two means of proof to one party in the same cause. In all this reasoning the holy preceptor does not ac-

Another construction refused.

* "For this is not properly the proof of a negative, but the proof of some position totally inconsistent with what is affirmed."—*Ibid.*

quiesce, as it is not inferrible from the use of the term "*even*," nor from the context, nor from the subject matter. Further discussion is needless.

● Penalty of
suborners and
false witnesses.

48. False witnesses have already been treated of: their punishment is next declared. "Suborners, and witnesses guilty of falsehood, should be severally punished in a penalty double that of the suit; and a Brahmin should be banished*." He who by means of a gift of money or otherwise, induces witnesses to depose falsely, is a suborner: he, and they, who falsely depose accordingly, are to be severally or individually punished in a penalty double that of the suit, that is to say, in a penalty double that which is awarded on the loss of the suit respectively, and a Brahmin is to be banished, that is to say, expelled from the country, but not [otherwise] punished.

Special rules
in certain cases.

49. This must be understood as having special relation to a case, where the operation of avarice or other passion has not been ascertained, and not habitual. *Menu* has declared the punishment, when the motive of avarice or other passion has been ascertained, and habitual: "If he speak falsely through covetousness, he shall be fined a thousand *panas*; if through distraction of mind, *two hundred and fifty*, or the lowest amercement; if through terror, two mean amercements; if through friendship, four times the lowest; if through lust, ten times the lowest amercement; if through wrath, three times the next, or *middlemost*; if through ignorance, two hundred complete; if through inattention, a hundred only†.

* *Yājñyavalkya*, cited in the *Vivādatandava* and *Smṛitichandricā*.

† *Menu*, 8. §§ 120, 121, cited in the above authorities.

50. *Covetousness*, cupidity; *distraction of mind*, perturbed state of the intellect; *terror*, fear; *friendship*, excessive partiality; *lust*, extreme desire of female enjoyment; *wrath*, anger; *ignorance*, defective knowledge; *inattention*, indifference as to information. By the numerals *one thousand*, &c. is always to be understood *panas*, or copper pice.

Explanation of the terms in the texts of *Menu*.

51. A just king will punish the three inferior tribes giving false evidence, having amerced them; but he will banish a Brahmin. This relates to a case of repetition, as is denoted by the use of the present participle (*koorvan*). Having amerced the tribes, *Cshetryas* and the rest, with the fines above specified, he will punish them by stripes, &c. because the term *prubas*, in the ordinary acceptance, signifies corporal punishment, and the subject has relation to the ethical code. Corporal punishment includes cutting off the lips, amputation of the tongue, and deprivation of life; and this must be understood as being proper to be inflicted with reference to the nature of the false evidence.

Punishment of the three inferior tribes for repeated perjury.

52. But having amerced a Brahmin, he will banish him: that is to say, he will expel him from the country, or denude him, as the meaning of the term *bibasyet* may signify the stripping off the clothes. By giving the causal affix, the penultimate syllable is rejected, as in the case of a derivative formed from a crude noun with the affix *ishtha**. Moreover, the term *vasa*, residence, signifies a house, or place of habitation; and the term *bibasyet* may therefore

Punishment of the priestly tribe for the same offence.

* An explanation of this sentence would involve a grammatical disquisition of some length. It displays an ingenious effort to save the Brahminical tribe, if not *totidem verbis*, at least *totidem literis*.

mean, that he should unhouse him. The award of the fine for each description of motive must be given against a Brahmin with special reference to its being avarice or other motive, and in a case of nonrepetition ; but in a case of repetition, a pecuniary fine and banishment also ; and here also with relation to the tribe, the subject matter, and the quality [of the parties], &c. the term *bibasum* must be interpreted as signifying denudation, destruction of dwelling, or banishment from the country. In a case of false evidence, where there is no proof of avarice or other motive, where there has been no repetition of the offence, and where the subject matter is inconsiderable, a pecuniary fine must be awarded against a Brahmin similar to that prescribed for the military and other tribes ; but where the subject matter is considerable, expulsion from the country also ; and the text of *Menu* is applicable to the case of all [the tribes], where [the perjury] is habitual.

Brahmin
may be fined,
but on no ac-
count corporal-
ly punished.

53. It should not be urged, that a Brahmin is exempted from a pecuniary fine, because it would follow, (as corporal punishment is prohibited,) that in the case of a trivial fault, it would be requisite to punish him by denudation, destruction of dwelling, branding, or expulsion, or else (as the only alternative) to exempt him from punishment altogether. It also appears *justifiable* from the texts: "To the four tribes, not performing expiation, he should adjudge the lawful penalty, corporal and pecuniary*." "A Brahmin must be amerced a thousand, who approaches by force the secluded females of the regenerate tribes†." As to the text of *Sancha*,

* *Vivádatandava*.

† *Ibid*.

“Of the three tribes, privation of substance and death are modes of punishment; but expulsion and branding are prescribed for the priestly order*.” Here the term privation of substance extends to confiscation of the whole property, from its being placed in juxtaposition with the term death; as appears also from the following text, in which death and privation of substance are cited together: “Corporal punishment includes imprisonment, and even life; and a pecuniary fine of *panas*, &c. may extend to the whole property, from its being placed in juxtaposition with the term death.” But the text, “He shall expel him from the country, leaving his property wholly untouched,” relates to an offence of the lowest degree, and not to offences in general. Moreover, corporal punishment must never be inflicted on a Brahmin. *Menu*, having propounded generally, “Never shall the king slay a Brahmin, though practising all possible crimes,” proceeds: “No greater crime is known on earth than slaying a Brahmin: and the king therefore must not even form in his mind an idea of killing a priest†.”

54. Moreover, the text, “He who having been called on for testimony, being influenced by his passions, conceals from others, should be punished eight fold, and, if a Brahmin, should suffer banishment‡.” The meaning is, He who having accepted the office of a witness, and being called on for his evidence together with the other witnesses, being influenced by his passions, his mind being under the impulse of anger or the other passions, at the time of speaking, conceals

Penalty for
concealing evi-
dence.

* Ibid.

† Ibid. *Menu*, 8. § 380, first stanza and 381.

‡ *Yājñyavalkya*, cited in the *Vivádatandava*.

his evidence from the rest of the witnesses, saying, 'I am not a witness in this case,' should be amerced in eight times the amount awarded on the loss of the claim; and if a Brahmin, and unable to pay a fine equal to eight times the amount, he should suffer banishment: and the term *bibasum*, or banishment, may be here interpreted denudation, destruction of house and home, or banishment from the country, according to the circumstances of the case. But if persons of other tribes are unable to pay eight times the amount, they must be made to work at their several avocations, strictly confined, or sent to prison. The provisions of a former text also must here be attended to: When all the witnesses conceal, they are equally culpable.

Contradiction punishable.

55. But when, after giving their testimony, they afterwards contradict it, they must be punished with reference to the quality [of the parties], &c. as *Catyáyana* has declared: "Persons having spoken, afterwards contradicting, should be amerced as prevaricators*."

Tampering with witnesses prohibited.

56. Witnesses cited by one party should not be secretly approached by the other, as *Nāreda* has declared: "He shall not secretly approach a witness summoned by another; neither should he cause him to differ with another: a person so practising loses his suit†."

Standing mute and deposing falsely, enjoined in favour vile.

57. Standing mute, and deposing falsely, have been generally prohibited on the part of witnesses. To this he pro-

* *Fivádatandava*.

† *Smritichandricá*.

pounds an exception : “ A man may speak falsely, in a case involving death to any of the tribes*.” Where it is probable that by speaking truth, death may happen to a *Sudra*, a *Vaisya*, a *Cshetrya*, or a *Brahmin*, there a witness may speak falsely : he should not speak truth. Therefore, by the prohibition of speaking truth, standing mute, and deposing falsely, on the part of witnesses, which were formerly prohibited, are now enjoined. Where, in an accusation supported by circumstantial or other evidence, if, by speaking truth, death will ensue to any of the four tribes, and by speaking falsely death will not ensue to any one, in that case falsehood is enjoined. But where by speaking truth, death will ensue to either the complainant or the defendant, and by falsehood also death will ensue to one or other party, there silence is enjoined, should the king consent. But should the king by no means admit of silence, the evidence should be nullified by contradiction ; and if that cannot be effected, the truth must be stated : because, by speaking falsely, there will be the double offence of the homicide of one of the tribes, superadded to that of falsehood ; but by speaking truth, there will only remain the offence of the homicide of one of the classes.

58. In this case, expiation must be performed according to law. Lest it should be supposed, that, in such case, standing mute and speaking falsely being enjoined by law, there is no offence, the text has been propounded : “ A *Sarṁswatee* oblation must be presented by regenerate men for the

Expiation
to be performed
in such cases.

* *Yājñavalkya*, cited in the *Vivādatandava* and *Smṛitichandricā*.

sake of purification from the offence*." For the sake of purification, that is, for the sake of removing the offence caused by standing mute or speaking falsely, a *Saraswatee* oblation must be severally presented by regenerate men. Belonging to the goddess *Saraswatee*, therefore called *Saraswatee*. The term *Churoo* signifies an oblation consisting of sound warm boiled rice.

59. The meaning is, that speaking falsely and standing mute, before prohibited, are here authorized. But the text, "That man is criminal, who either says nothing, or says what is false and unjust†," relates to general falsehood or silence, and this is the expiation for transgressing that prohibition. It should not be supposed that the authority in the text is inconsistent, and argued. that although standing mute and speaking falsely have been authorized, yet that the offence arising out of a transgression of the general prohibition remains the same; because standing mute and speaking falsely is a graver offence on the part of witnesses, but falsehood and silence generally is a slighter offence. Therefore the text granting the authority is pertinent. Although in other instances the removal of the graver offence occasions the removal of its concomitant slighter offence, yet in this instance, from the expression of the authority and the injunction of the expiation, the graver offence is removed, and its concomitant offence, though slighter, is not removed. This is to be understood.

Obligation noticed.

And replied to.

In this instance the graver offence is removed, though the slighter one re-

* *Yājñyavalkya*, cited in the *Vivādatandava* and *Smṛitiçhandricā*.

† Last stanza of a text of *Menu*, 8. § 13.

60. The authority to speak falsely must also be understood as extending to travellers and others in [answering] general questions, in cases where the lives of any of the tribes are in danger: nor is there any expiation in such case, from there being no express prohibition. No penalty shall attach to witnesses or others on the truth of the story appearing by another cause and at another time: this also is inferrible from the text. The chapter on witnesses is here concluded.

Expiation not
incumbent on
casual false
witnesses.

CHAPTER VII.

OF WRITTEN PROOF.



SECTION 1.

1. Having treated of possession and witnesses, written proof is next propounded; but a writing is of two descriptions, public and private. The nature of a public writing has already been explained; a private writing is now treated of: this is of two descriptions,—prepared by the party himself, and prepared by others. That which is prepared by the party himself requires no witnesses: that which is prepared by others requires witnesses. The mode of proving these two depends on local and peculiar usages, as *Náreda* has declared: “Written evidence is declared to be of two sorts; *the first*, in the handwriting of the party himself, which need not have subscribing witnesses; and the *second*, in that of another person, which ought to be attested: the validity of both depends on the usage established in the country†.”

General definition of written proof.

2. Next is propounded the rule regarding a writing prepared by others: “When any matter is mutually agreed

Rule respecting an instrument prepared by others.

* *Vivádatandava*, *Smritichandricá*, and *Vyavaháramayac’ha*.

upon voluntarily, a writing must be drawn out with respect to it, with the insertion [of the name] of the obligor, and duly attested*." When any agreement is voluntarily entered into, or stipulation made mutually between the creditor and debtor, whether relating to gold or other *valuables*, then a writing must be executed, fixing the period of payment and the monthly rate of interest, for the purpose of establishing the fact on the expiration of such period; and it must be attested by witnesses of the description already mentioned. "With the insertion of the obligor,"—in which the obligor is mentioned, or* in which the name of the obligor is mentioned in writing.

A contract may be binding without a writing.

3. Or else witnesses of the description before mentioned may be employed, as appears from the following text of the *Smṛiti*: "For the purpose of proving any act done by the party transacting it, witnesses may be relied upon in judicial proceedings. The act of a party may be good without a writing†."

Distinguishing marks to be inserted in a writing.

4. Moreover, "The year, month, fortnight, day, name, tribe, family, scholastic title, the names of the parties' fathers, &c. must be specified‡." *The year*,—twelvemonth. *The month*,—as Cheyt and the like. *The fortnight*,—the light or dark half of the month. *The day*,—the first or other day of the moon's age. *The name*,—the name of the creditor and of the debtor. *The tribe*,—Brahminical or other. *The*

* *Yājñawalkya*, cited in the above authorities.

† *Vivādatandava*.

‡ *Yājñawalkya*, cited in the *Smṛitrichandricā* and *Vyavahāramayūc'ha*, but uncertain in the *Vivādatandava*.

family,—descended from *Vashistha* or other stock : with these, that is to say, with the year, &c. it must be distinguished ; also with the *scholastic titles*, as the title of *Buho-branchha* or *Kutha*, assigned as the mark of distinction for reading a portion of the *Vedas*. *The names of the parties' fathers*,—that is, the names of the fathers of the creditor and debtor. By the term “ &c.” is intended the nature of the subject matter, the occupation [of the parties]. The meaning, connected with what went before*, is, that the writing should be distinguished by these characteristics.

5. An agreement having been executed, the debtor should sign his name with his own hand, and should add, “ what is above written is agreed to by me the son of such a one.” A matter having been stipulated between the creditor and debtor, and the agreement having been determined and executed, the debtor, that is to say, the obligor, should subscribe his name with his own hand and should moreover add or insert in the instrument, that what is above written is agreed to or approved by him the son of such a one.

The obligor should subscribe the writing.

6. “ The witnesses also, being equal, should write with their own hands, specifying the names of their fathers, ‘ I, being such a one, am witness to this matter†.’ ” Those persons who are specified in the instrument as being witnesses should each, having specified his own and his father's name, individually write with his own hand, that he, such a one, *Devadutta* or the like, is a witness in the matter in question.

The witnesses also should subscribe.

* Alluding to the text cited in verse 2.

† *Vivadatandava*.

Being equal, signifies equality in point of number and qualifications.

Rule to be observed where the parties and their witnesses are ignorant of the art of writing.

7. If the debtor or the witnesses be ignorant of the art of writing, then the debtor and each of the witnesses by means of others, in presence of all the witnesses, must cause to be written their assent, as *Nāreda* has declared: "That debtor who is ignorant of the art of writing, shall cause to be written his assent; or if the witness is ignorant, by means of another witness, in presence of all the witnesses*." Moreover: "The scribe must enter this: being solicited by both parties, by me the son of such a one, this has been written†." The scribe, being solicited by both parties, that is to say, by the obligor and obligee, should write at the foot of the instrument: By me *Devadutta*, or other name, the son of *Vishnamitra*, or other name, the above has been written.

Of a writing executed by the party himself.

A writing prepared by the party himself is now treated of. "But every document, which is in the handwriting of the party himself, is considered as sufficient evidence even without witnesses, unless obtained by force or fraud‡." That instrument which has been executed by the obligor with his own hand, has been declared by *Menu* and other sages to constitute proof without witnesses, provided it were

* *Vivadatandava*.

† *Yājñyavalkya*, cited in the *Vivadatandava*, *Smṛitichandricā*, and *Vyavahāramayāc'ha*.

‡ *Yājñyavalkya*, cited in the *Vivādabhaṅgārṇava*, *Vivadatandava*, *Smṛitichandricā*, and *Vyavahāramayāc'ha*.

not obtained by means of force and lesion*. By force,—violence. By lesion,—that which is effected under the influence of fraud, avarice, anger, fear, intoxication, &c.—provided it was not obtained by these means. *Nāreḍa* also has declared: “That writing is not proof, which is executed by a person intoxicated, by one under duress, by a female, by a minor, and that which is effected by force, and by intimidation, and lesion†.”

9. And a writing executed by the party himself, or by means of another, should specify whether it is accompanied or unaccompanied by a pledge, should be drawn out according to peculiar local usages, and should not be deficient with respect to the import and language. This is all that is requisite. It is not necessary that its conditions should be expressed in classical or provincial language; as *Nāreḍa* has said: “That which is not adverse to peculiar local usages, and declaratory of the nature of the transaction of a pledge. That instrument is termed proof, which is connected in import and language‡.” *Transaction* signifies making; the *transaction of a pledge*, the making a pledge: its nature, whether a simple deposit, or usufructuary, or for a specified period. Declaratory,—*making manifest*. Such

Mode in
which it should
be drawn out.

* Compulsion by illegal distraint of liberty, or by intimidation of threats and penance of bodily harm, is duress. It vitiates a contract or obligation extorted by its means.—Colebrooke on Obligations and Contracts, Part I. p. 235. Lesion, presumptive of imposition or oppression, is a ground of rescinding any contract, executory or executed.—Ibid. p. 234.

† *Vivādatandava*, but *Hareeta* cited in the *Smritichandricā*.

‡ *Vivādatandava* and *Smritichandricā*.

is the meaning of the terms: declaratory of the nature of the transaction of a pledge. *Connected in import and language*: the import and the language—the terms in which these are preserved in due order. By this is meant “connected in import and language*.” Such a writing is proof. Here it is not requisite, as in the case of a public and royal instrument, that it should be expressed in classical language.

A bonded debt claimable from the son and grandson of the obligor.

10. In treating of the instrument, it may be mentioned, that the debt specified therein should be discharged by three persons: “A debt specified in writing must be paid by three persons alone†:” as in the case of a debt contracted in the presence of witnesses, it must be paid by three persons, so in the case of a bonded debt, it must be paid by the obligor, his son, and grandson, but not by the fourth in descent, or those after him. This is ordained.

Objection answered.

11. Should it be objected, that a text has already declared universally: “By sons and grandsons, a debt must be discharged‡,” by which it is already provided, that a debt must be paid by three persons, it is admitted: but the above text has been propounded to preclude the supposition, that in the case of bonded debts, there is, in another text, any exception to the precept. Thus, having treated of the nature of a bond, it has been declared by *Catyáyana*: “Such contracted by the ancestors must be discharged after the lapse

* It is not practicable to render a faithful translation of the original in this place, the disquisition being intended to exemplify the rule for forming the Sanscrit compound designated *Buhobrihi*.

† *Catyáyana*, cited in the *Vivádatandava*.

‡ *Ratnácara*.

of time*.” *Such* alludes to the bonded debts. The debts of the ancestors must be discharged by their representatives, even though a long time may have elapsed. Here by the use of the plural number “*ancestors*,” and the mention of the lapse of time, it might be inferred that the debts must be discharged by the fourth in descent, and those after them. Moreover, the text of *Hareeta*, “He will obtain payment who holds a bond†.” Here also it might be inferred, from the general mention respecting the payment of the debt to any person holding a bond, that by the fourth in descent, and those after them, payment should be made. To obviate such a supposition, the above text has been properly recited. The two last-mentioned texts must be reconciled to the injunction of *Yogeeshwara*.

The text has been recited to exonerate the fourth in descent.

12. He states an exception: “A pledge may be enjoyed until the debt is repaid‡.” This text has been recited, lest it should be supposed, from the number being limited to three, that in the case of a bonded debt accompanied by a pledge, he who is exempt from the payment is also not entitled to redeem the pledge; and it implies, that until the debt is discharged by the fourth or fifth in descent, the pledge may be enjoyed: it follows, that the fourth, or those after him in descent, are entitled to adjust a debt accompanied by a pledge. Should it be objected, that this exception is superfluous, from the occurrence of a former text, “An usufructuary pledges

Case in which the fourth and others in descent may adjust the debt.

* *Vivádatandava*.

† *Vecramitrodaya*.

‡ *Catyáyana*, cited in the *Vivádatandava*.

§ Cited in the chapter on pledges.

is not forfeited*,” it is replied, that were it not for this exception, that text might be considered to extend to three persons only. All this is irrefragable.

A new instrument may be executed in certain cases, by the consent of the parties.

13. Having disposed of incidental topics, the original subject is now reverted to. “An instrument being in another country, or badly written, or destroyed, or effaced, or stolen, or torn, or burnt, or divided, he shall cause another to be executed†.” By this text it is directed, that he shall execute another when the *original* instrument is insufficient to prove the transaction; and its insufficiency to prove the transaction consists, as declared, in its being in another country, or in its being badly written, &c. *Badly written*, signifies, when the writing is bad, in consequence of the words or characters being written in a corrupt, equivocal, or unintelligible manner. *Destroyed*,—by lapse of time. *Effaced*,—in consequence of the ink having become pale, or by other means, when the writing is rubbed out. *Stolen*,—by thieves or others. *Torn*,—pulled to pieces. *Burnt*,—by fire. *Divided*,—split into two; and this holds good by the consent of the plaintiff and defendant.

Mode of proceeding when the parties object to the execution of a new instrument.

14. “But if they disagree, and the instrument be in a country remote from the scene of litigation, a period of time calculated with reference to the distance must be allowed for its production: or if the instrument be in a distant country, or destroyed, the case may be decided by having recourse to witnesses, as *Nāreda* has declared: “In the case of an in-

* A part of the last stanza of the above text.

† *Yājñyavalkya*, cited in the *Smṛitichandriā*, but *Catyañana* in the *Vivādatandava*.

strument being deposited in another country, or destroyed, or badly written, or stolen. Should it be in existence, time *must be allowed*: should it not be in existence, ocular evidence must be resorted to*." A period of time must be allowed for the purpose of producing an instrument which is in another country, in existence, and forthcoming. But should it not be in existence, and not forthcoming, the case must be decided by having recourse to the ocular evidence of such witnesses as have formerly seen it. But where there are no such witnesses, the decision must be according to a divine test; as appears from the text, "Recourse must be had to a divine test, in a case where there is no writing or witnesses†."

15. And this relates to a private document; the same rule is applicable to an official document, but there is this distinction: "In all cases, that is termed an official document, which is signed with the king's hand, and sealed with his seal in witness thereof‡."

What is termed an official document.

16. Another species of official document has been defined by *Vṛiddha Vasistha*: "That is termed a decree, which comprises the matter adduced to be proved, the answer, the pleadings, and the decision, sealed with the royal seal, and signed by the chief judge and others. The subject matter being proved, he shall give the decree to the

Of a favourable decree.

* *Vivādatandava* and *Vyavahāramayūc'ha*.

† *Vivādatandava*, but *Cat'yāyana* cited in the *Vyavahāramayūc'ha*.

‡ *Vasistha*, cited in the *Vivādatandava*, but *Nāreda* in the *Smṛitichandricā*.

§ *Vivādatandava* and *Smṛitichandricā*.

hands, that they, being sons of such and such persons, approve the judgment; from the following text of *Menu*: “Those assessors who are there present, conversant in the holy texts, shall give their signature under their own hands, according to the rule for writings*.” The case is not divested of embarrassment, unless all the assessors are unanimous, as *Náreda* has declared: “Where all the assessors are unanimous in opinion that [such a decision] is right, the case is divested of embarrassment; otherwise, it remains embarrassed†.” This applies to a suit consisting of four divisions, from the text: “That which establishes the thing to be proved, which consists of four divisions, and which bears the royal seal, is termed a decree *pro*‡.”

Of an unfavourable decree.

17. But where there is a loss [of the suit], “as in the five cases, One who contradicts, a prevaricator, one who does not attend, one who stands mute, and one who being summoned absconds§;” in such cases there is not a favourable decree, but a decree *contra*. This is [awarded] for the purpose of adjudging amercement at a future period||.

* Cited as the text of *Catyáyana* in the *Veeramitrodaya* and *Smritichandricá*.

† *Vivádatandava*.

‡ *Vivádatandava*, but cited as the text of *Vrihaspati* in the *Smritichandricá*.

§ *Vivádatandava*.

|| It was before laid down in Chap. ii. Sec. 1. §§ 8, that one who is nonsuited is to be fined; but he does not therefore forfeit all claim to the subject matter, and the text here merely means that a judgment of nonsuit is to be recorded, with the view of amercing the party in default.

But a decree *pro* is for the purpose of establishing a plea of former judgment. This is the distinction.

18. He next treats of the means of clearing up doubt from a document. “In a disputed case, the document must be proved by the handwriting of the party or the like, by reasonable inference, *by evidence* of the contract *which the instrument records*, by a *peculiar* mark, by connexion and dealings of the party, by *the contents* of the document, or by *previous recourse* to measures for recovery*.” The ascertainment of the fact, whether a document is genuine or fabricated, may be by those who wrote it. The meaning is, that a document may be proved by means of another document written by the same person, and if the writing assimilates, this is one method of [clearing up.] From the term “or the like” must be understood the comparison of the handwriting of the attesting witnesses and the scribe, by means of other documents. *Reconcilement* to means of probability, is the meaning of the term “*reasonable inference* ;” reconcilement of the relation between the property, and the time, place, and persons, that at such a time, and in such a place, such a person is likely to have possessed so much property. This is what constitutes *reasonable inference*. *By evidence*, means, that of the attesting witnesses. *By a peculiar mark*, some distinguishing mark, such as *sri*, &c. *By connexion*,—that is, the former relation of money transactions between the parties on account of mutual

Mode of clearing up doubt from a contested document.

* Uncertain in the *Vivádatandava*, but *Yājñyavalkya* cited in the *Vivádabhangárnava*, *Smritichandricá*, and *Vyavaharamayúc'ha*.

winning party§." The assessors also shall give it under their confidence; and by inference is also implied the consideration as to the probability of the receipt of so much property from such a person. These are the means, and the import is, that by these means doubt attaching to a document may be cleared up. But where the doubt as to a writing cannot be cleared up, there recourse must be had to witnesses for the purpose of decision, as *Catyāyana* has declared: "Where a document is impugned, the claimant must adduce the witnesses named therein*." This text relates to a case where the witnesses are forthcoming. But where they are not forthcoming, the text of *Hareeta* applies: "Having impugned a document, by saying, This document was not executed by me, but has been fabricated by him, the decision must be by divine test†."

Mode of proceeding where the debtor is unable to discharge the whole debt at once.

19. In answer to the question, what is to be done after the doubt has been cleared up, and payment caused to be made of the debt, if the debtor should not be able to discharge the whole debt, he replies: "The debtor, having paid by degrees, shall record [the payments] on the back of the document, and the creditor shall write with his own hand the amount of the receipts‡." If the debtor is unable to discharge the whole amount of the debt, then, having paid by degrees, according to his ability, he shall record on the back of the original document, So much has been paid by me; or the creditor

* *Vivādatandava*.

† Ibid.

‡ Ibid.

shall account, on the back of the original document, for the sums realized or received by him, and record that so much has been repaid to him. In what manner? By a record of his own hand, or under his own handwriting; or the creditor should give to the debtor a written receipt for what has been repaid, drawn up in his own handwriting.

20. He next proceeds to declare how the document should be disposed of, the whole debt being discharged. "Having discharged the whole debt, he should tear up the writing, or cause another to be executed for acquittance*." Having discharged the debt, whether by degrees or all at once, he should tear up the original writing. But if such writing be in an inaccessible country, or be destroyed, then, for acquittance or putting an end to the debtorship, the debtor should cause the creditor to execute another writing, and in like manner the creditor should give to the debtor a deed of acquittance. This is the meaning. He next declares what is to be done on the discharge of a debt attested by witnesses. "The repayment of an attested debt should be attested†." One should repay an attested debt in the presence of its former witnesses. Thus ends the chapter of documentary evidence.

What is to be done after the discharge of the debt.

Those who witnessed the loan should witness repayment also.

* *Yājñyavalkya*, cited in the *Vivādatandava*.

† The last stanza of the above text.

CHAPTER VIII.

OF EVIDENCE BY DIVINE TEST.



SECTION 1.

1. The threefold description of human evidence, writings, witnesses, and possession, have been propounded. Now being about to treat of divine test in its proper place, he states the general definition of a divine test in five texts, commencing with the text: "The balance, fire, water," &c. He now declares, the divine tests, "The balance, water, fire, poison, and sacred libation, are the divine tests for purgation*." According to the sacred code, five ordeals, commencing with the balance, and ending with sacred libation, are to be administered for the purpose of purgation, or the removal of suspicion in a doubtful matter.

Five principal methods of ordeal.

2. But [should it be objected], that there are other ordeals, such as grains of rice, &c. as expressed in the text of *Pitamaha*, "The balance, fire, water, poison, and sacred libation, and grains of rice, are ordeals. Hot metal forms the seventh mode†." And how then can there be only those enu-

There are altogether seven methods of ordeal.

* *Yājñyavalkya*, cited in the *Vivādatandava* and *Vyavahāramayac'hā*.

† *Vivādatandava*.

merated? It is replied, that these are for heavy charges. The restrictive meaning is, that these are for heavy charges, and not otherwise. It is not meant that they are the only ordeals. He will hereafter describe the meaning of a heavy charge. But [should it be objected], that in trifling charges also, the sacred libation is made use of, from the text, "In a trifling case, the sacred libation is to be administered:" it is admitted; but the enumeration of the sacred libation, together with the balance and the rest, is not intended to confine its use to heavy charges, but for the sake of including [its use] in a charge supported by a binding asseveration, otherwise it might be confined to the case of a presumptive charge, from the text, "He should administer the ordeals of the balance and the rest to persons under a charge supported by asseveration, but in cases of presumptive charge, grains of rice and sacred libation: in this there is no doubt*."

Scales, and the other four methods of ordeal, to be used in certain cases.

3. No distinction having been laid down between heavy charges, whether presumptive or supported by a binding asseveration, in the case of an accuser binding himself to abide by the award [in case of failure], he propounds an exception: "These, the balance and the rest, are for a person accused, where the accuser binds himself to abide by the award†." The award is the fourth division of the suit, involving defeat or success: by it the penalty is ascertained. Abiding by that, is abiding by the award, and he obtains the penalty annexed to such award.

* *Vivadatandava*.

† *Yājñyavalkya*, cited in the *Vyavahāramayūc'ha*.

4. "The claimant shall immediately reduce to writing the evidence of the thing to be proved*." This rule has been propounded relative to a claimant who maintains the affirmative of a proposition. He now propounds an exception: "By consent, either party may have recourse to it. Either may abide by the award†." By consent, that is, by the mutual agreement of the accuser and the accused, either the accuser or the accused may have recourse to ordeal, and either the accuser or the accused may abide by or take on himself the award of corporal or pecuniary penalty. This is the meaning. An ordeal is not like human evidence, confined to an affirmative only; but it extends indiscriminately both to affirmatives and negatives. So that in the case of a total denial, or a special plea, or plea of former judgment, ordeal may be resorted to at the option either of the complainant or defendant.

An ordeal may be resorted to, in proof of a negation, as well as of an affirmation.

5. The ordeal of sacred libation may be resorted to in trifling charges, or heavy charges, or those which are presumptive, or those which are supported by a binding asseveration, indiscriminately. This has been said. But the ordeal of the balance, down to that of poison, is only applicable to heavy charges, and those which are supported by a binding asseveration. But an exception has been propounded to the rule, as far as regards binding asseverations: "Let him act without binding himself to abide by the award, in the case of treason against the king, and of a grievous offence ‡." Let him have recourse to the balance and other ordeals, without abiding by

Different ordeals applicable to different accusations.

* *Vide supra*, Chap. 1. Sec. 6. § 1.

† *Vyavahāramayūc'ha*.

‡ *Vivādatandava* and *Vyavahāramayūc'ha*.

the award, in an accusation of treason against the king, or in an accusation of killing a Brahmin or other grievous offence; also in an accusation of heinous robbery, as has been declared in the text: "Let an ordeal be administered, without binding by the award, in the case of persons suspected by the king, and those implicated by robbers*, and those intent on their own justification†." But the ordeal by grains of rice is only for petty thefts, as appears from the text of *Pitamaha*: "The ordeal by grains of rice is to be administered in cases of theft, but not in other cases. This is certain‡." The ordeal by hot metal§ is to be used in cases of robbery of magnitude, as appears from the text, "The ordeal by hot metal has been propounded for those who are accused of robbery ||."

Other divine tests described.

6. Moreover, other divine tests are used on trifling occasions. "By his veracity, by his horse or elephant, and his weapons, by his kine, grain, and gold, by the deities, by his ancestors, and by [the relinquishment of the fruit of] virtuous actions; or let him touch the heads of his children, and wife, and intimates, or in an accusation admitting of it¶, the

* Although from the fact of robbers being unworthy of belief, the mere implication by them should not raise suspicion, yet as the term "of those implicated by robbers" has been used in conjunction with "persons suspected by the king," suspicion is excited.—*Subodhini*.

† Cited as the text of *Nāreda* in the *Vivādatandava*.

‡ Ibid.

§ This ordeal, called *Tuptamasha*, is performed by taking gold or other metal from clarified butter while hot.

|| Ibid.

¶ The printed copy of the *Mitacshara* has it *Surveshoo*, in all accusations; but the true reading, as explained by *Subodhini*, is *Suhyeshoo*, admitting of it.

sacred libation*.” These divine tests propounded by *Menu*, are declared by *Náreda* and others to be applicable to trifling occasions. Should it be asserted, that ordeal is a means of decision where human evidence is not to be resorted to, and that oaths are, according to popular acceptance, ordeals, [it is replied,] there has been a distinction propounded between these and the ordeals of the balance, &c. the effect in the latter case being immediate, and, in the former, future, as in the terms *Brahmin* and *Puribrajuka*†. But the sacred libation, though enumerated among oaths, is classed with the ordeal of the balance, &c. not because the effect of it, in common with the ordeal of the balance, &c. is immediate, but because, in common with those, it is applicable to weighty charges, and charges supported by a binding

Distinction
between an
oath and an or-
deal.

* *Náreda*, cited in the *Vivádatandava* and *Vyavaháramayt'ha*.

† The import of this illustration is, that ordeals and oaths are not convertible terms. The meaning has been thus explained by *Subodhini*: “As the separate mention of the term *Puribrajuka* indicates another purpose, so the separate mention of oaths indicates, that they are intended for another purpose. That purpose has already been declared, [in assigning their use to trifling occasions,] or the meaning of the use of the terms *Brahmin* and *Puribrajuka* may be thus exemplified. Invite a *Brahmin*, and invite a *Puribrajuka*. In this sentence, by the mere injunction to invite a *Brahmin*, the injunction to invite a *Puribrajuka* also may be comprehended, [inasmuch as all *Puribrajukas*] or *Suniasees* are *Brahmins*, though all *Brahmins* are not *Puribrajukas*; and the separate injunction to invite a *Puribrajuka*, proves that the *Brahmin* and the *Puribrajuka* must be considered as distinct individuals. So also in this instance, although the balance and the rest, and oaths, may both be comprehended under the designation of ordeal, yet, from the separate use of the terms oath and ordeals, the term ordeal must be considered as distinct from the oath, and as relating to the balance and other similar ordeals.

And between
different kinds
of ordeal.

asseveration. But the ordeal by grains of rice and hot metal are not classed with the ordeal of the balance, &c. although the effect of both modes is immediate, because they are applicable to trifling occasions and presumptive charges. These ordeals and divine tests are to be resorted to in cases of debt and other occasions, according to circumstances.

Text of *Pitama-*
maha explain-
ed.

7. But the text of *Pitamaha*, " In actions relative to immoveable property, ordeals are to be avoided*, " is explained by the interpretation, that they are to be avoided, in case documents and neighbouring witnesses are forthcoming. Should it be objected, that in other actions also, recourse cannot be had to ordeals, where there exist other means of proof,—it is admitted: but in actions for debt and the like, should witnesses of the prescribed qualifications be adduced by the plaintiff, and should the defendant bind himself to abide by a penalty and rely on an ordeal, then an ordeal may be resorted to, because there may be the fault of partiality in witnesses, and because there cannot be any fault in an ordeal, from its being an indication of the reality and an emblem of justice, as *Nāreda* has declared: " Justice consists in truth, and litigation [is dependant] on witnesses. In a case admitting of divine test, recourse need not be had to oral or documentary evidence†." The text of *Pitamaha* is propounded, not for the purpose of excluding ordeals altogether, but for the purpose of excluding the supposition, that in actions relative to immoveable property, the decision by ordeal may be resorted to by a defendant,

* *Vivādastandava* and *Vyavahāramayoc'ha*.

† *Vivādastandava*.

who binding himself to abide by a penalty, relies on ordeal, there being documents and neighbouring witnesses. Should this not be [the interpretation], then in actions relative to immoveable property, there could be no decision in the absence of documents and neighbouring witnesses*.

8. Moreover : " Having called the person, fasting, at sunrise, who has bathed with his clothes on, let him administer all ordeals in presence of the prince and of Brahmins†." The judge shall administer the ordeals, having called the person who is subjected to them in the morning, at sunrise, fasting, having bathed, in his clothes, in the presence of the prince and of the attendant Brahmins. " Ordeals are to be administered for purgation always to a person fasting for three nights, or fasting for one night‡." The difference here propounded by *Pitamaha* as to the degree of fasting must be regarded in practice according as the matter is grave or trifling, great or small. The rules regarding fasting, should be applied also to the officiating chief judge, from the text of *Nāreda* : " Let the chief judge transact all matters by ordeal, fasting, in the same manner as sacrificing priests conduct sacrifices by order of the king§."

Ceremonies
to be observed
with respect to
ordeals in ge-
neral.

* The meaning is, that in actions relative to immoveable property, where the plaintiff adduces documents or the evidence of neighbouring witnesses, the defendant cannot have recourse to an ordeal ; but in the absence of such evidence, he may have recourse to an ordeal in actions relative to immoveable property, notwithstanding that the plaintiff adduces other evidence.

† *Vivadatandava*.

‡ Ibid.

§ *Pitamaha*, cited in the *Vivadatanaava*.

Different times propounded for different ordeals.

9. Although the time of sunrise is here propounded without distinction, yet, by approved practice, ordeals are to be administered on Sundays. "In the morning the ordeal of fire, in the morning the ordeal of the balance must be administered, in the forenoon that of water must be administered, by a person desirous of discovering the truth. The purgation by sacred libation is propounded for the first part of the day. In the latter part of the night, when it is very cool, the ordeal by poison must be administered*." These distinctions propounded by *Pitamaha* must be observed. As no particular time has been propounded for the ordeals of grains of rice and hot metal, they must be administered in the morning, from the following general injunction of *Nāreda*: "The administering of all ordeals has been declared proper in the morning†."

Particular seasons enjoined for particular ordeals.

10. The day being divided into three parts, the first part is termed the morning, the second, the forenoon, the third, the evening. The distinction of time must depend on the cases of the injunction or prohibition. The cases of injunction [are now declared.] The frosty and cold seasons, and the rainy seasons, are declared [the proper times] for [administering the ordeals by] fire. Water in the autumn and summer season. Poison in the frosty and wintry, and in the months of Cheyt, Aghun, and also Bysakh; these three months are common, and not adverse to any ordeals. Sacred libation may be given at all times; and the balance is not confined to any particular period‡." The use of the term sa-

* *Vivādatandava* and *Vyavahāramayūc'ha*.

† *Vivādatandava*.

‡ *Nāreda*, cited in the *Vivādatandava*, but *Pitamaha* in the *Vyavahāramayūc'ha*, excepting the last hemistich.

cred libation, is intended to include all oaths. As no distinction has been propounded for [the ordeal of] grains of rice, it is not limited to a particular period.

11. The cases of prohibition are as follows:—"Purgation should not be by water in the cold weather; nor should purgation be by fire in the warm weather; nor should one administer [the ordeal by] poison in rainy weather, nor that of the balance in windy weather; nor in the afternoon, nor in the evening, nor in the middle of the day*." The word "cold," mentioned in the text, "Purgation should not be by water in the cold weather," includes the wintry, frosty, and rainy seasons. The word "warm," mentioned in the text, "Nor should purgation be by fire in the warm weather," includes the summer and autumn season. Although the injunction was before laid down, the prohibition is used for the sake of giving greater effect. The object will be hereafter propounded. He now treats of the condition of the persons.

Particular seasons prohibited.

12. "Ordeal by balance is declared for women, minors, old men, blind and lame persons, Brahmins, and sick persons. Fire or water, or seven barleycorns of poison, for a man of the servile tribe†." The term *women*, implies females in general, without respect to distinction of tribe, age, or condition. The term *minors*, signifies one who has not attained his sixteenth year, without respect to tribe. *Old men*,—those who have passed their eightieth year. *Blind*,—

Ordeals for particular persons.

* *Nāreḍa*, cited in the *Vivādatandava*.

† Cited as the text of *Yājñyavalkya* in the *Vivādatandava* and *Vyavahāramayāc'ha*.

deprived of vision. *Lame persons*,—whose feet are useless. *Brahmins*,—persons of that tribe generally. *Sick persons*,—those afflicted with disease. The [ordeal by] balance alone is declared fit for the purgation of these. A red-hot plough-share, or hot metal for a *Cshetrya*, and water for a *Vaisya*, as appears from the disjunctive term “or.” Seven barley-corns of poison are for the purgation of a man of the servile tribe; and from the declaration of the balance being for *Brahmins*, and from the declaration in the text, “or seven barley-corns of poison,” that poison is the ordeal for a *Sudra*, it is proper to apply the ordeals of fire and water to *Cshetryas* and *Vaisyas*. This has been explicitly declared by *Pitamaha*: [“Ordeal by] balance is to be administered to a *Brahmin*, and fire to a *Cshetrya*. Water is declared for a *Vaisya*; and one should cause the [ordeal by] poison [to be administered to] a *Sudra*.”* But the text depriving females of ordeal, namely, “When the truth is sought after, an ordeal will not be administered to those who are doing penance, or severely afflicted, or sick, or devotees, and women†,” has been recited for the purpose of taking away the alternative [allowed in other cases], namely, “By consent, either party may have recourse to it‡.” It has moreover been declared: In charges accompanied by a binding asseveration, women and the like being the parties charged,

* *Vivádatandava*.

† *Náredu*, cited in the *Vivádatandava*.

‡ See verse 4. In other words, where women and the other persons specified are either party in a cause, it shall not be optional for either party to have recourse to ordeal; but the ordeal should be resorted to by the party, who may not be involved in the disqualifying text. But where both parties are women, or fall under any other of the specified exceptions, there the general rule applies.

the ordeal is to be administered to those making the charge ; and where these [that is to say, women] are the parties making the charge, the ordeal [is to be administered] to the party charged ; but where they mutually accuse each other, there is an option : and here also [the ordeal by] balance alone is enjoined for women. It appears also from the explanation of the same text, that the balance alone is for women and others in presumptive charges of weighty and other offences ; but the text becomes applicable by restricting the ordeal of women by balance to the months of Cheyt, Aghun, and Bysakh, which are applicable to all ordeals and not [by interpreting it that the ordeal by] balance alone is at all times [proper] for women. This appears from the text, [The ordeal by] “poison has not been declared for women, nor has that by water been propounded ; by the balance, by the sacred libation, and the rest, their hidden secrets must be explored*,” which explains the balance, sacred libation, fire, &c. excluding poison and water. The same rule is applicable to minors, and the others [enumerated]. The injunction as to the use of the ordeal by balance, &c. for Brahmins and the rest, is not to make it alone admissible at all periods, as is evident from the text of *Pitamaha*: “The purgation by sacred libation is declared applicable to all tribes. All these are declared applicable to all, except poison to Brahmins†.” Hence the text has been propounded for the purpose of determining that the ordeal is to be by balance, &c. in a period which is common to all ordeals, and where many ordeals would be admissible‡.

* *Nāreda*, cited in the *Vivādatandava*.

† *Vivādatandava* and *Vyavahāramayūc'ha*.

‡ This explanation is rather tortuous. The meaning, however, is this. The general injunction is, that during three months of the year, (Cheyt, Aghun, and Bysakh,) any mode of ordeal is admissible. The

Continuation
of the subject.

13. But at any other period, the ordeal appropriated to that period for all. In the rainy season, fire alone is for all. In the wintry and frosty seasons, there is an option either of fire or poison to *Cshetryas* and the other two tribes, but only fire to Brahmins, and never poison, from the prohibition, "except poison to Brahmins." In the autumn and summer seasons, only water. But to such as are afflicted with a peculiar disease, in which the use of fire and water is prohibited, such as those described in the following text, "Let one keep away fire from leprous persons, and water from the feverish, and let one keep away poison from those oppressed with bile and phlegm*:" to them, even at the proper time for fire and other ordeals, let the ordeal of the balance, and others which are common to all times, be administered. "Water, fire, and poison must be administered to persons in health†." From this text it is inferrible, that to them, as well as to weakly persons, the ordeals suitable to the tribe, condition, and age of the parties are to be administered, without contravening the seasons and periods fixed by the injunctions and prohibitions.

particular injunction follows, that to women, Brahmins, &c., the purification by balance alone should be administered. There are other texts, however, which declare that any ordeal, except poison and water, may be administered to women, and that any except poison may be administered to Brahmins. It becomes, therefore, necessary to reconcile these conflicting texts, which is done by stating, that in the three months above specified the ordeal by balance alone should be administered to women, Brahmins, and the rest. By the same rule, in those months, fire should be the ordeal for a *Cshetrya*; water for a *Vaisya*, and poison for a *Sudra*.

* *Hareeta*, cited in the *Vivádatandava*.

† *Vivádatandava*.

14. It has been declared*, "These are for heavy charges." ^{What is termed a heavy charge,} He now explains what constitutes a heavy charge. "One should not take a [red-hot] ploughshare under a thousand, nor poison, nor the balance." One should not administer the ordeal of a ploughshare, of poison, or of the balance, under a thousand *panas* : nor that of water, which is included, as has been declared : "In heavy charges, one should cause to be administered the ordeal of the balance, down to that of poison†." In such cases, that of sacred libation should not be resorted to, from the text, "In a trifling case, sacred libations are to be administered‡." The above four ordeals are to be administered in cases where [the subject matter] exceeds a thousand *panas*, but not under. This is the meaning.

15. But [should it be objected], that fire and the other ^{Objection replied to.} [three] ordeals have been declared by *Pitamaha* applicable to cases under a [thousand] in the following text, "One should administer the balance in the case of a thousand; in the case of half a thousand, iron; in the case of half the moiety, water. Poison is declared applicable in the case of half of that¶." It is admitted, but the text of *Pitamaha* applies to a case where the taking involves degradation, and the text of *Vijnaneswara* applies to other cases. This is the practice, and these two texts apply to cases of robbery and aggression.

* Verse 2.

† *Veeramitrodaya*.

‡ Ibid.

§ That is, the ploughshare, poison, the balance, and water.

¶ *Veeramitrodaya*.

Distinction
in civil and criminal cases.

17. A distinction has been propounded by *Catyāyana* in the case of a denial. "In the case of a denial of receipt, evidence must be resorted to. But in cases of robbery and aggression an ordeal may be administered, even though the subject be trifling."

And with
reference to
the amount of
the suit.

17. Having ascertained the amount of all the property, it should be made into gold, [that is] having ascertained the number of the *suvernas*,—if a hundred be lost, poison has been declared the ordeal; and also if eighty have been lost, fire. If sixty have been lost, water is to be administered; or if forty, the balance; and sacred libation is propounded in the case of the loss of twenty or ten. In case of the loss of five or more, or half, or a quarter of that number, grains of rice. In a case involving the loss of half or a quarter of that again, let him, the deponent, touch the heads of his sons or other relations. But in a case involving the loss of half or a quarter of that again, the usual means have been enjoined. A king so distinguishing suffers no injury spiritually or temporally*."

Explanation
of the above
text.

18. "Having ascertained the number of *suvernas*." &c. Here the term *suverna* means sixteen *mashas*; and the word *suverna* is used to signify the quantity above specified. The term loss here is intended to suppose denial. "One should not take the ploughshare under a thousand†." This must here be understood to mean a thousand copper *panas*.

* *Vivādatandava*.

† Vide *supra*, § 14.

19. But should it be objected, that in accusations of treason against the king or other grievous offence, these ordeals have been ordained : how then can the text, "He should not take the ploughshare under a thousand," apply ? It is replied : "Where the king is a party, and the accusation is grave, being pure, they should always take these ordeals* : " (that is,) in accusations of treason against the king or other grievous offence, being purified by fasting and the other means, they should perform these ordeals, without reference to the amount of the property (involved).

20. The particulars as to place have been detailed by *Nāreda*. In a public assembly, in the gate of the king's palace, in the temple of the deity, and in the plain. It must be fixed, immoveable, and worshipped with frankincense, chaplets of flowers, and ointments. It—the balance, must be fixed.

21. The situation has also been detailed by *Catyāyana*. "Let him establish it in *Indra's* place of worship for those accused of weighty offences and grievous sinners : at the king's gate for those intending treason against the king. The ordeal must be given where four roads meet, to those born in the inverse order of the tribes ; and in other cases, let the ordeal be given in the midst of the assembly. This let the wise know. The decision should not be made by the king, in the case of those offenders who serve persons unfit to be touched, and vile, or of barbarians. In a case of doubt, he should administer to those the ordeals in common use among them.

* This is the second hemistich of the text commencing, "One should not take," &c.

SECTION 2*.

Of the Ordeal by Balance.

Mode of proceeding with respect to.

1. Having treated of the introduction to ordeals, which applies to ordeals of every description, he now propounds the nature of the ordeals by the balance and the rest. "The accused being placed in the balance by persons acquainted with the mode of holding the scales, and being balanced by an image, a line having been made, and (the accused) being taken down, he should invoke the balance with the following prayer:—'Thou, O balance! art the mansion of truth: thou wast constructed of old by the gods; then, O fortunate one, declare the truth, and relieve me from suspicion. If in this I did commit a crime, O mother! then do you bring me down; but if I am innocent, lift me up†.'"

Interpretation of the text.

2. By goldsmiths and others, who are familiar with the practice of holding the scales or weighing by them, the accused, or the accuser, or he who is about to undergo the ordeal, being balanced or brought to a level, by means of an image, made of earth or other materials, and being placed or seated on the scales, having made a line, or having drawn a chalk mark in the vicinity of the place where he

* Some apology is perhaps necessary for exhibiting to the public the puerilities contained in the following pages, but the account has been given with the view of showing the entire system. The substance of the doctrine of Hindu ordeals is contained in the first volume of the Asiatic Researches, and from that publication the account has been transferred to the Encyclopædia Britannica, in which there is a curious description of the ordeals in use in former times and by other nations.

† *Yājñyavalkya*, cited in the *Divyatatva* and *Veeramitrodaya*.

(the weigher) stands, under the strings of the balance, while in the act of balancing by means of the image, and being taken down, he should invoke the balance, or should pray to it with this invocation :—" O balance! thou art the abode of truth. "*Of old,*"—in the beginning of the creation. "*By the gods,*"—by *Hirunyagurbha* and other deities. "*Wast constructed,*"—or created. "*Then,*"—or therefore declare "*the truth,*"—or show the real nature of a doubtful matter. "*O fortunate,*"—or O propitious! relieve me from this suspicion. O mother! "*if I did commit a crime,*"—or if I utter a falsehood, then bring me down; but "*if I am innocent,*"—or speak truth, then lift me up."

3. The invocations are specified by other authorities, which are to be used by the chief judge when invoking the balance. That which has been stated, applies to the person about to undergo the ordeal. As that which constitutes success or defeat may be understood from the terms of the invocation, it has not been separately treated of. But the construction of the scales, the mode of ascending them, and other matters requiring explanation, have been clearly treated of by *Pitamaha*, *Nāreda*, and others.

Invocation to be used by the party undergoing the ordeal.

4. "Having cut down a tree suitable for sacrifice with a *muntra*, and using the formula as to a sacrificial pillar, (*Yoopa*.) and having made obeisance to the regents of the world, (*Lokapalas*.) the balance should be constructed by intelligent persons. The *muntra* of *Soma** must be repeated at the time of cutting down the trees†."

Tree to be cut down with certain ceremonies.

* *Soma*, or the moon, being the god of the woods.

† *Pitamaha*, cited in the *Divyatatwa* and *Veeramitrodaya*.

Method of
constructing
the balance.

5. "The (beam of the) balance should be made equilateral, strong and straight; and three rings should be attached in three places, as necessary. The (beam of the) balance should be made four hands long, and the two posts (to which it is attached) should be made equal to it (in dimensions.) The intervening space between the two posts should be two hands, or one hand and a half. Both posts should be fixed under ground (in depth) two hands. Two (*Toranas*) or cross bars should be fastened to each side of the posts; but these must always be placed ten fingers higher than the scales. Two *Abalumbas* or perpendiculars should be attached to the cross bars, made of earth, secured with string, and hanging down so as to touch the top of the scales or basons. The balance must be placed to the eastward; immoveable, and in a purified place*."

Method of
weighing.

6. "Having adjusted the two strings to both the extremities (of the beam), he should place *Cusa* grass in each of the scales in an easterly direction. He should place the person who is about to undergo the ordeal in the western scale or bason, and pure earth in the other side. He should cause the cavities of the basons to be filled up with brickdust, gravel, or earth†." The mention of brickdust, gravel, or earth, shows that either of them may be used. "Examiners should be appointed, who are acquainted with the manner of weighing, as traders, goldsmiths, and braziers. The duty of the examiners is to see that the perpendiculars and the

* *Pitamaha*, cited in the *Divyatatwa* and *Veeramitrodaya*.

† *Pitamaha*, cited in the *Divyatatwa*, but *Nāreda* in the *Veeramitrodaya*.

basons are even. Water should be placed in the scales by *Pundits*, and, if the water does not flow over, it may then be considered that the balance is level. Having first weighed the individual, let him then be taken down*.”

7. “ The balance should also be decorated with banners and flags ; afterwards the person acquainted with the meaning of the formula should invoke the gods ; the offerings of perfumes, garlands, and sandal ointments having been presented in the prescribed mode, accompanied by the music of the *Vaditra*† and *Tooryaya*‡. The chief judge, facing the east, with hands folded, should thus speak : ‘ O *Dharma*, enter into this ordeal with all the regents of the world, (*Lokapalas*,) *Vasus*§, *Adityas*||, and *Marutas*¶.’ ”

Forms and ceremonies to be observed on the occasion.

8. “ Having first invoked *Dharma*, or the god of justice, to enter into the balance, he should then call on the *Angas*, or subordinate deities. Having placed *Indra* on the east, and *Pretesa*** on the south, *Varuna* on the west side, and *Cuvera* on the north ; *Agni*, and the other regents of the

* *Pitamaha*, cited in the *Veeramitrodaya* and *Divyatatwa*.

† A sort of musical instrument, of which four species are reckoned, as wind instruments, stringed instruments, &c.

‡ A sort of musical instrument.

§ A *Vasu* is one of the eight divinities who form a *Gunna*, or assemblage of gods ; and there are nine of these *Gunnas*. As. Res. p. 40, vol. iii.

|| The twelve *Adityas* are said to be the offspring of *Aditi*, who is called the mother of the gods. They are emblems of the sun for each month of the year.

¶ *Marutas*, or genii of the winds.—See Moor’s Hindu Pantheon, p. 93.—*Pitamaha*, cited in the *Veeramitrodaya* and *Divyatatwa*.

** *Yama*, or literally, the lord of departed spirits.

Worship of
the regents of
the world.

world, he should place on the intermediate points (of the compass.) The colour of *Indra* is yellow, of *Yama* dark blue, of *Varuna* white as crystal, of *Cuvera* golden, and *Agni* also golden, of *Nirriti* dark blue.—*Vayu* is celebrated as being of a purple or smoky colour, and *Isana** is of a red colour. These must successively be thus meditated on†.

Of the *Vasus*. 9. "The wise should worship the *Vasus* on the south side of *Indra*. *Dhara*, *Dhruva*, *Soma*, *Apa*, *Anila*, *Anala*, *Pratyusha*, and *Prabhasha*; these eight are termed *Vasus*‡."

Of the *Adityas*. 10. "A site for the *Adityas* should be made between those of *Indra* and *Isana*. *Dhata*, *Aryayama*, *Mitra*, *Varuna*, *Ansa*, *Bhaga*, *Indra*, *Vivaswan*, *Pusha*, *Paryanna*, these ten, and *Twashtwa* and *Vishnu*, the elder and the younger born: these are the names of the twelve *Adityas*§."

* *Divyatatwa*, that *Isana* is of a white colour.

† *Pitamaha*, cited in the *Veeramitrodaya* and *Divyatatwa*.

‡ *Pitamaha*, cited in the *Divyatatwa*.

§ *Pitamaha*, cited in the *Divyatatwa*.—It is recorded in the *Puranas*, that the twelve *Adityas* were begotten by *Casyapa* on his wife *Aditi* in a *Calpa*, and their names correspond with the above, with the exception of *Vishnu*, *Paryanna*, *Ansa*, and *Indra*, instead of which they are read *Savita*, *Vidhata*, *Sakra*, and *Urucrama*; and in another *Culpa*, *Sunga*, the daughter of *Viswacarma*, was married to *Aditya*, and as she was unable to endure her husband's splendour, she complained to her father, who made him (the *Aditya*) into twelve pieces, each of which appears to represent him as *Surya* or the sun, distinct in each month of the year. It is mentioned in the *Adityahridaya*, that *Aroona* appears in the month of *Magh*; *Surya* in *Falgun*; *Vedunga* in *Chey*; *Bhanoo* in *Bysakh*; *Indra* in *Jeth*; *Rabi* in *Asarh*; *Gab'husti* in *Sawun*; *Yama* in *Bhadoon*; *Soovurnareta* in *Assin*; *Divacura* in *Cartic*; *Mitra* in *Aghun*; and *Vishnu Sunatana* in *Poos*. The legend is related differently by *Ward*.—See vol. ii. p. 45; and *Moor*, Article "*Aditya*."

11. "The wise should make a site for the *Roodras** on the west of *Agni*. *Virabhadra*, *Sumbhoo*, *Grisa* who is most famous, *Ajaicapuda*, *Ahi*, *Budhnya*, *Pinakée*, *Aparajita*, *Bhoovanadhiswara*, *Capali*, termed *Vishampati* or lord of the *Vaisyas*, and *Sth'hanurbhava*; these are the eleven *Roodra* deities†."

Of the *Roodras*.

12. "The abode of *Matris* should be made between that of *Pretesa* and the *Racshas*‡: *Brahmi*, *Maheswari*, *Caumari*, *Vaishnuvi*, *Varahi*, *Mahendri*, and *Chamunda* attended by her *Ganas* or train: (these are *Matris* §.)"

Of the *Matris*.

13. "The wise should make an abode for *Gunes* || on the north of *Nirriti* ¶."

Of *Gunes*.

14. "The site of the *Marutas* is said to be on the north of *Varuna*.—*Gaguna*, *Sparsana*, *Vayu*, *Anila*, *Maruta*,

Of the *Marutas*.

* See Moor, Article "*Roodra*." The *Roodras* are distinctions of *Siva* in his character of fate or destiny.

† *Pitamaha*, cited in the *Divyatatwa*.

‡ The *Racshas* are a species of evil genii, generally engaged in malignant combinations; not however always.—Moor's Pantheon, p. 96.

§ *Pitamaha*, cited in the *Divyatatwa*.—The eight *Sactis*, or energies of as many deities, are also called *Matris* or mothers. They are named *Brahmi*, &c. because they issued from the bodies of *Brahma* and the other gods respectively. (*Raya Mucuta* on the *Ameracosha*.) In some places, they are thus enumerated: *Brahmi*, *Maheswari*, *Aindri*, *Varahi*, *Vaishnuvi*, *Caumari*, *Chámunda*, and *Charchica*. However, some authorities reduce the number to seven; omitting *Chámunda* and *Charchica*, but inserting *Cauveri*.—See *As. Res.* p. 82, vol. viii.

|| The god of prudence and wisdom.

¶ Regent of the south-west quarter.—*Pitamaha*, cited in the *Divyatutwa*.

Pran, Pranes, and Jiva; these eight are called *Marutas**."

Of *Doorga*. 15. "The wise should invoke *Doorga* on the north of the balance; and all these deities should be worshipped by their respective names†."

Offerings to be presented. 16. "Having made offerings, beginning with *Arghya*‡, and ending with ornaments, in the first place to *Dharma*: then the offering beginning with *Arghya* and ending with ornaments should be made to the *Angas*. Next the offerings beginning with perfumes and ending with food should be presented to them§."

Mode in which the worship is to be performed. 17. Having decorated the balance with flags and banners, *Dharma* should be invoked with this incantation, (*Ahyahi*.) Approach! Approach! Then having pronounced this *muntra*, *Dharmayarghyaumpraculpayami numa*, or I present this *Arghya* to *Dharma*: after this *Arghya*, *Padya* (water for cleaning the feet, &c.), *Achmani* (water for sipping), *Madhuparca*||, then *Achmani* again, *Snan* (water for bathing), dress, the sacrificial cord, then *Achmani* again, the *Cataka* or ring, *Mukuta* or crest, and other ornaments should be presented to *Dharma*: then having repeated the *mun-*

* *Pitamaha*, cited in the *Divyatatwa*.

† *Pitamaha*, cited in the *Divyatatwa*.

‡ An *Arghya*: that is, water, rice, and *durvā* grass in a conch, or in a vessel shaped like one.

§ *Pitamaha*, cited in the *Divyatatwa*.

|| This is made with honey, curds, and butter in a vessel of *sinc*.

tra, beginning with the word *Pranava*, and ending with *Numa!* the presents, beginning with *Arghya*, and ending with ornaments, should be offered in succession to the other deities, beginning with *Indra* and ending with *Doorga* in their respective names in the fourth case; afterwards having offered perfumes, flowers, incense, lamps, food-offerings, and the like to *Dharma*, then the perfumes, &c. are to be offered, as above stated, to *Indra* and the other deities. For worshipping the balance, the perfumes, flowers, &c. must be of a red colour, as *Nāreda* says :—“ Having first worshipped the balance with the offerings of red perfumes, garlands, curds, fried rice, &c. then the other deities should be worshipped.” As no particular mention has been made regarding *Indra* and the other deities, they may be worshipped with offerings of every colour, whether red or otherwise, as procurable. —This is the order of worship.

18. These acts must be performed by the chief judge, as has been declared :—“ The chief judge,—who should be a Brahmin, learned in the *Vedas* and *Vedāṅgas*, familiar with religious observances, as ordained by the *Sruti*, even-minded, devoid of passion, devoted to truth, pure, able, benevolent, universally charitable,—fasting, clothed in purified garments, and with cleansed mouth, should, according to the prescribed mode, worship all the deities*.”

Qualifications
of the officiating
chief judge.

19. By four (*Rriticas*) or family priests, seated on the four sides of the balance, the *homa* should be performed on the (*Lowkicagni*) or domestic fire,† as has been declared :—

The *Gayatri*
to be repeated.

* *Pitamaha*, cited in the *Divyātutwa*.

† Radhacant Deb in his Sanscrit Lexicon, observes :—*Agni* was first begotten by *Dharma* on his wife named *Basu*. *Agni* espoused *S'waha*, of whom

“The burnt offering (*homa*) should be presented on four sides by the learned in the *Vedas*; the *homa* should be performed with the presents of *Ajya* (clarified butter), *Habisa* (rice boiled with milk), and *Samida* (small branches of certain trees); the *homa* should be celebrated with the *muntra*, beginning with *Savitri Pranava* and ending with the word ‘*Swaha**.’” Having pronounced the *Savitri Gayatri*, and then the *Gayatri* beginning with the word *Pranava* and ending with the word *Swaha*, the *homa* should be performed by offering the *Ajya*, *Charoo*, and *Samida*, one hundred and eight times severally.—This is the meaning of the text.

The accusation should then be written with a *muntra*, and placed on the head of the accused.

20. After the completion of the worship of the deities, ending with the burnt offering, a document should be prepared, containing the matter alleged [against the party about to undergo the ordeal], together with the following *muntra*; and that document should be put on the head of the person accused; as is said:—“The matter of which the person is accused should be written down with this *muntra*, and that [the document] should be placed on the head [of the accused]†.” The *muntra* is:—“The sun, moon, wind, fire, heaven, earth, water, mind, *Yama*, day, night, both (morn-

were born *Pavaca*, *Pavamana*, and *Suchi*. In the sixth *Munwantara*, *Dravinacu* and others were begotten by *Agni* on his wife *Basudhara*, and forty five *Agnis* were procreated by *Dravinaca* and others, sons of *Agni*. They are altogether forty nine in number. In particular religious observances and ceremonies, *Agni* is to be invoked by several names, thus in *Lowkicu* or worldly affairs, such as entering into a new house, and the like, *Agni* is termed *Pavaca*, &c. &c.

* *Divyatatwa*.

† *Ibid*.

ing and evening) twilights, and *Dharma*, know the actions of

21. These forms, beginning with the invocation to *Dharma*, and ending with placing the written charge on the head, are applicable to all ordeals; as has been declared:—"All these formulæ he should apply to all ordeals: so the invocation of the gods should be made in the same manner†."

The above ceremonies applicable to all ordeals.

22. Afterwards the chief judge should invoke the balance from the text:—"The person who knows the *muntra* should, according to the prescribed mode, invoke the balance‡." "Who knows the *muntra*," that is, who is acquainted with its meaning. "O balance, thou wert created by *Brahma* for the detection of evildoers, by the letter *d'ha* thou art the image of *Dharma*, and, by the letter *tha* it appears that, holding the vicious, thou revealest their acts, on account of which thou art named *D'hatha* or balance. Thou knowest the virtues and vices of all created beings. Thou only knowest all, and those things which mortals do not know. This person wishes to be relieved from the suspicion in which he is involved, as thou, by thy virtue, art competent to extricate him from the difficulty§."

Invocation by the chief judge.

23. The person who is about to be examined, should invoke the balance with the text formerly recited, ("Thou, O Balance," &c. § 1,) and afterwards the chief judge should

The person about to undergo the ordeal, should also invoke before being weighed.

* *Divyatatwa*.

† *Ibid*.

‡ *Ibid*.

§ *Divyatatwa* and *Veeramitrodaya*.

place the person who is about to undergo the ordeal, and has taken the written charge on his head, in the same place ; that is, in the mode according to which he was first placed in the scale ; as has been said :—“ The person who has taken the written charge on his head, should be again placed in the scale*.”

Period of weighing.

24. Having been placed in the scale, he should be kept in it during the period of five *binarhis* complete. Persons learned in astronomy should be appointed to compute that period, as the text declares :—“ The Brahmins who are eminently skilled in astronomy, should be appointed for the purpose of computation, and by those, the time of examination must be considered as five *binarhis*†.” The time taken for articulating ten hard letters makes a *pran* : six *prans* make a *binarhi* ; as is said :—“ [The time of pronouncing] ten hard letters is a *pran*, six *prans* are one *binarhi*‡.” Sixty *binarhis* are one *ghatica* : sixty *ghaticas* are one day and night, and thirty days are one month.

What persons should be appointed, to decide as to the question of guilt or innocence.

25. Purified persons should be appointed by the king, to examine during such period into the guilt or innocence of the accused, and they should pronounce as to his innocence or guilt ; as has been said by *Pitamaha* :—“ Brahmins are the most excellent of witnesses. They, being speakers of truth, according to the real state of the case, learned, purified, and uncovetous, should be appointed as evidence by the king ;

* *Dinyatatwa* and *Veeramitrodnya*.

† *Dinyatatwa*.

‡ *Ibid*.

they should represent to the king regarding the guilt or innocence of the accused*.”

26. The rule for ascertaining the guilt or innocence is thus propounded :—“ No doubt, should the person balanced go up, his innocence is established ; if he be level, or come down, then he is not innocent†.” An exception to this rule is declared by a text of *Pitamaha* :—“ A slight crime brings level, and a heavy one takes down‡.”

Rule for ascertaining the point.

Exception.

27. The meaning of this is, that though it cannot be ascertained by the ordeal, whether the matter charged be light or heavy, yet that [the offence] having been committed once only and unintentionally, renders it light, and its having been repeatedly done and intentionally, renders it heavy ; and thus the rule of slight and heavy amercement and penance may be ascertained.

Explanation of the exception.

28. Where, without any known or visible cause, the *Cácsa* and the like are cracked or broken, guilt is established. The text declares :—“ In case of the *Cácsa* breaking, or of the splitting of the beam and basons of the scale, or of the *Carcatas*, or the bursting of the strings, or of the *Acsa* breaking, the guilt of the person is evidenced §.”

Other evidence of guilt.

29. “ *Cácsa* signifies the bottom of the string ; *Carcata*, the rings bent like the horn of a ram, attached to each ex-

Explanation of the terms.

* *Dīvyatatwa*.

† Ibid.

‡ Ibid.

§ Ibid.

tremity of the beam to which the strings are fastened ; *A'c-sha* the transverse beam fixed to the two pillars, from which the scales are pending. If these, however, are broken by any visible means, the person must be again placed in the scale ; a text says :—" At the breaking or splitting of the strings or other parts of the balance, he should cause the person [the accused] to be replaced in it*."

Distinction.

Fees to be paid to the officiating priests.

30. He should then cause the *Briticas*, *Purohitas*, and *Archaryas*, or sacrificial priests, to be satisfied with their fees. "The king who performs such acts, having tasted the most delicious enjoyments, acquires eminent fame and becomes identified with *Bramha*†."

Precaution to be adopted when the scales are required for future use.

31. If he wish to establish the balance, as above described, in the same place [for future use], he must build a hall with shutters and the like, to prevent the entrance of crows and other animals, as the text declares :—" He should cause to be erected a large, elevated, and white balancing-hall, situated in a place in which it may not be injured by dogs, *Chandalas*, and crows. He should surround the house with the *Lokapalas*, or regents of the world, and other deities ; and they [the *Lokapalas*] must be worshipped thrice in the day, with perfumes, garlands, and sandal ointments. He should cause the house to be made with shutters, filled with seeds, guarded by servants, and containing earth, water, and fire, so as not to be empty‡." " *Seeds*," grains of barley, rice, and the like.—Thus has been declared the ordeal by balance.

* *Divyatatwa*.

† *Ibid*.

‡ *Pitamaha*, cited in the *Veeramitrodaya*.

SECTION 3.

Of the Ordeal by Fire.

1. He now declares the [ordeal by] fire as next in order. Having his hands rubbed with rice, he should place seven leaves of the *Ashwathha* * tree, and should tie them with so much thread†. There being general rules, as described in the introduction of the trial by ordeal, and there being peculiar rules for [the ordeal by] balance, from the invocation of *Dharma*, to the placing the written charge on the head inclusive, this is a peculiarity in the form of [ordeal by] fire.

Forms to be observed in this ordeal.

2. “*Rubbed with rice*,” means, he by whom both his hands have been rubbed or cleaned with rice.—Having made a stain with lac dye, or other material, on the spots where there were moles, freckles, warts, scars, sores, &c. as *Nāreda* has ordained:—“In all the hurts of the hand he should make vermilion marks‡.” Afterwards he should place seven *Ashwathha* leaves in the palms of the open hands, from the text:—“Having filled the palm of the hand with seven equal *Ashwathha* leaves§.” He should next tie them up together with the hands by as many threads as there are *Ashwathha* leaves; that is to say, he should tie them with seven. These seven threads should be white, as appears from the text of *Nāreda*:—“He should tie

Explanation of the text.

Other ceremonies to be observed.

* *Ficus religiosa*.

† *Yājñyavalkya*, cited in the *Divyatatwa* and *Veeramitrodaya*.

‡ *Divyatatwa* and *Veeramitrodaya*.

§ *Veeramitrodaya*.

the hands with seven strings of light coloured thread†." He should then place seven *Sumee*‡ leaves, and seven blades of *Doob* grass, with fried grain, and fried grain mixed with curds, on the top of the *Ashwaththa* leaves, from the text :— " He should place seven leaves of the *Pippala*§ tree, seven *Sumee* leaves and fried grain, seven blades of *Doob* grass, and fried grain mixed with curds||." He should also place flowers, as appears from the following text of *Pitamaha* : — " He should place in the hands seven leaves of the *Pippala* tree, fried grain, jasmine, and curds, and then tie them up with thread¶." "*Jasmine*," a species of flower.

Arca leaves to be used only when the *Pippala* leaves are not procurable.

3. As for the text, " He is clear who is unburnt to the seventh circle holding redhot iron in his hands wrapped up in seven leaves of the *Arca*** plant††." That must be understood as prescribing the use of *Arca*** plant††." That must be understood as prescribing the use of *Arca* leaves, where *Ashwaththa* leaves cannot be had. The leaves of the *Ashwaththa* must be considered the principal, from their having been extolled in the following text of *Pitamaha* :—" Fire is produced from the *Pippala* tree. The *Pippala* is considered as the chief of trees. Therefore a wise man should place the leaves of it in the hands††."

† *Divyatatwa*, and *Veeramitrodaya*.

‡ *Mimosa pudica*, a sort of sensitive plant.

§ The holy fig-tree, or *ficus religiosa*.

|| *Divyatatwa*.

¶ *Divyatatwa*, and *Veeramitrodaya*.

** *Asclepias gigantea*, or *Swallow wort*.

†† *Vyavahiramayūc'ha*.

‡‡ *Veeramitrodaya*.

4. He next propounds the invocation to fire by the party undergoing (the ordeal):—"Thou, O purifying fire, dwellest in the interior of all creatures. Thou, O fire, pronounce, like a witness, the truth of my innocence or guilt*." Thou, O fire, dwellest in the interior—within the corporeal system of all creatures, whether viviparous, oviparous, engendered by heat and damp, or produced from the earth: thou art present by the preparation of food adapted to each. O purifier, or cause of purity: O fire, that provest the innocence of the distressed, speak like a witness the truth of my innocence or guilt. *Poonyupapabhiu* (innocence or guilt) is the fifth case, formed by rejecting the affix *lyup*. The meaning is: speak or declare the truth with reference to innocence and guilt.

Invocation to be used by the party undergoing the ordeal.

5. The ball of iron being heated by three ignitions, and being brought before him by means of a pair of tongs, the party undergoing the ordeal, standing in the western circle with his face to the eastward, should invoke the fire with the formula: according to *Nāreda*:—"Having heated, with a threefold ignition, a redhot, shining, polished iron ball, he should speak, invoking truth†."

Position of the accused.

6. The meaning is this. For the purpose of cleaning the iron, having cast the redhot iron ball into water; having again heated it and cast it into water, and having heated it by a third ignition, and it being extracted and placed before him, by means of a pair of tongs, the party about to perform

Explanation of the text.

* *Divyatatwa* and *Veeramitrodaya*.

† *Divyatatwa*.

(the ordeal) should utter the *formula* of, "Thou, O fire, &c." invoking truth—or calling on the name of truth.

Ceremonies
to be performed
by the chief
judge.

7 The chief judge, having placed a common fire at the south side of the extremity of the circles, should perform the burnt offering with clarified butter, repeating the *formula* "*Agnaye Pavacāya Śivaha*," one hundred and eight times, from the text :—"For the purpose of pacifying it, he should make an offering to the fire, of clarified butter one hundred and eight times*."

Invocation to
be used by the
chief judge.

8. Having performed the burnt offering, and having thrown the ball of iron into that fire, and that being redhot, and having performed the ceremonies already described, commencing with the invocation to *Dharma*, and ending with the burnt offering; at the third ignition, he should invoke the fire inherent in the iron ball with this *formula* :—"Thou, O fire, art the four *Vedas*, and thou officiatest at sacrifices. Thou art the mouth of the gods. Thou art the mouth of deified sages. Thou dwellest in the interior of all creatures, therefore knowest thou the good and bad. By reason that thou cleanseest from sin; therefore art thou called purifier. Show thyself, O purifier, flaming in case of guilt, but in case of innocence, O fire, become cold. Thou, O fire, pervadest the system of all creatures, like a witness. Thou only, O deity, knowest what mortals do not comprehend. This man is arraigned in a cause, and desires acquittal. Therefore thou art capable of delivering him lawfully from this perplexity†."

* *Vyavahāramayāc'ha* and *Veeramitrodaya*.

† *Divyatatva* and *Veeramitrodaya*.

9. Moreover:—"He should place in both hands of him who has spoken, an iron ball of fifty *palas**, smooth and redhot †." "Of him," meaning the party who is to perform the ordeal; "who has spoken," who has recited the *formula* of "Thou, O fire, &c." "iron," a ball made of iron; "of fifty *palas*," equal in weight to fifty *palas*; "smooth," divested of all excrescences, on all sides round and polished. It should be eight fingers‡ in circumference, from the following text of *Pitamaha*:—"Having made a ball free from excrescences and smooth, eight fingers in circumference, and fifty *palas* in weight, he should heat it in the fire §." "Redhot," like fire. The chief judge should place or deposit it [the hot ball] in both hands covered with *Ashwaththa* leaves, curds, *Doob* grass, and other materials.

Dimensions and description of the red hot ball with which the ordeal is to be performed.

10. He next propounds what he should then do:—"He, taking it, should proceed exactly through seven circles slowly ||." That man, taking the redhot iron ball in the palm of his hands, should proceed slowly through the seven circles. By the use of the term "exactly" (*eva*), he shows that the feet are to be placed within each circle, and that the circles are not to be stepped over, as *Pitamaha* has said:—"He should not overstep a circle, nor should he place his foot behind ¶."

* The accused is to walk through seven circles.

* A weight of gold or silver equal to four *carshas*.

† *Yājñyavalkya*, cited in the *Divyatatwa*.

‡ *Angoola*, a finger's breadth, a measure of eight barleycorns.

§ *Vyavahāramayūc'ha*, *Divyatatwa*, and *Veeramitrodaya*.

|| *Yājñyavalkya*, cited in the *Divyatatwa*.

¶ *Divyatatwa*.

Extent of the
circles.

11. He should proceed exactly through seven circles slowly. This has been said. He next declares what is the extent of each circle, and what is the extent of the intervening space between the circles:—"The circle must be held to consist of sixteen fingers and so much the last*." That of which there are sixteen fingers is consisting of sixteen fingers. The circle must be considered as measuring sixteen fingers, and the last and middlemost of the circles exactly the same; that is, exactly sixteen fingers. By prescribing that he shall proceed through seven circles, it follows, that the first circle is the starting place, and that there are besides seven other circles of the extent specified. This has been declared by *Nāreda* in his specification:—"They have declared thirty two fingers between one circle and another. By the eight circles in this manner, there are two hundred fingers and forty fingers of land, over and above, in measurement†."

Explanation
of the text.

12. The meaning of this is that, after the starting circle, which measures sixteen fingers, follows the first circle, which, together with the second and each succeeding one, measures, with the intervening space, thirty two fingers. The starting circle alone measures sixteen fingers. The seven circles are to be walked over together with the intervening spaces consisting of thirty two fingers. By the eight circles, in this manner, there are two hundred and forty fingers in measurement. The word *Angoolamanatah*, "fingers in measurement," is formed by affixing *tusih* to the crude noun.

* *Yājñavalkya*, cited in the *Veeramitrodaya*.

† *Veeramitrodaya*.

13. In this process, however, having made a starting circle of sixteen fingers, and having divided, into two parts, each of the other seven circles or portions of land, consisting, with their intervening spaces, of thirty two fingers, passing over the seven portions of land, or circles consisting each of sixteen fingers which form the intervening space, seven circles proportioned to the size of the foot of the person about to walk, should be made in the remaining circles, which also consist each of sixteen fingers, as has been said by him also :—" He should make the measure of this circle equal to his foot*."

Small circles
are to be made
within the
larger ones.

14. It has also been said by *Pitamaha* :—" He should make eight circles, and after them a ninth. The first to be called (the circle) of fire, the second of *Varuna*, the third of the wind, the fourth of the deity *Yama*, the fifth of the deity *Indra*, the sixth of *Cuvera*, the seventh of *Soma*, the eighth of *Suvita*, the ninth of all the gods. This the wise have determined. They have declared thirty two fingers between one circle and another. By the eight circles, in this manner, there are two hundred fingers and fifty six fingers of land in measurement. Another circle is to be made, equal in measurement to the foot of the person about to walk. In each of the circles *Cusa* grass must be placed, as prescribed by the *Shasters*†." From these texts it follows, that, excluding the ninth circle, called the circle of all the gods, for which no particular measurement of fingers has been specified, by the eight circles and their intervening spaces, each consisting of sixteen fingers, two hundred and fifty six fingers are taken up : still as there are only seven

✱
Enumera-
tion of the cir-
cles, according
to the text of
Pitamaha.

* *Yājñyavalkya*, cited in the *Vyavahāramayūc'ha*, *Divyātutwa*, and *Veeraṃitrodaya*.

† *Vyavahāramayūc'ha*, *Divyātutwa*, and *Veeraṃitrodaya*.

circles to be travelled over, in the first of which he stands, and in the ninth of which he drops (the hot iron), there is no discrepancy.

Enumeration
of the terms of
measurement.

15. The measurement of an *angoola* or finger's breadth is this: eight *yuvas*, or very small barleycorns, make an *angoola* or finger. This is declared to be the measure of an *angoola*; but twelve *angoolas* or fingers make one *vitesti* or span; two *vitestis* or spans make one *husta* or cubit; four cubits make one *danda* or staff; two thousand of them make one *croso*, and eight thousand of them make one *yojana*. This must be understood.

If the hand is
burnt, he is cri-
minal;

16. Having gone over the seven circles, what is to be done? In answer to this he says:—"He obtains acquittal, if, having relinquished the fire, his hands being rubbed with rice, he is unburnt*." Standing in the eighth circle, and dropping the red-hot iron ball in the ninth circle, and rice being rubbed on both his hands, if his hands are unburnt, he obtains acquittal. But if his hands are burnt, he is criminal. This is the true meaning.

But not, if he
is burnt else-
where.

17. He who, trembling through fear, is burnt elsewhere than in his hands, is not on this account criminal, as *Catyáyana* has said:—"A person trembling under an accusation, if he is burnt elsewhere than in the proper place, the gods consider him as unburnt, and to him he should again cause (the ordeal) to be given. The ball falling in the intermediate space, or in a case of doubt, he should again take it†."

* *Divyatatwa.*

† *Yājñawalkya*, cited in the *Divyatatwa*.

18. When the ball of the person, in the act of walking, falls in the intermediate space, or short of the eighth circle, or where there is a doubt as to whether he is burnt or unburnt, he should then take it again.—Thus has the inferred meaning been declared.

19. And here the substance of the ceremony is recapitulated. Having performed the *Bhoota Shoodhee* on the day but one before: having on the day before constructed the circles as prescribed by law: having worshipped the inferior deities presiding over the several circles respectively: having prepared the fire: having completed the *Shanti homa* or propitiatory sacrifice to it: having placed the iron ball in the fire: having gone through the invocation to *Dharma*, and the worship of all the deities ending with the burnt offering: having performed the ceremony of rubbing with rice the hands of the person undergoing the ordeal, he being fasting, having bathed, and standing in his wet clothes, in the westernmost circle, and the paper containing the articles of charge being tied with the proper *muntras* on his head; the chief judge, having invoked the fire at the ignition, and taking the red-hot iron ball with a pair of tongs, should place it, being worshipped by the person undergoing the ordeal, in the palm of his hands; and he having gone through the seven circles, and dropped it in the ninth, if unburnt is innocent.—This is the law relative to fire.

Recapitulation
of the ceremony.

SECTION 4.

Of the Ordeal by Water.

1. He now propounds the rule regarding the (ordeal by) water:—"He (the accused) having used this invocation, 'Preserve me, O *Varuna*, by declaring the truth,' should

Forms to be
observed in this
ordeal.

enter the water, holding the thigh of a person immersed up to his navel*.”

Explanation
of the text.

2. “*Having used this invocation*,” or having invoked the water with this *formula*, “O *Varuna*, by declaring truth, preserve me ;” the person who is about to undergo the ordeal, having grasped the thigh of a person immersed up to his navel, that is, of a person standing in water of sufficient depth to reach his navel, should enter or plunge into the water.

Varuna must
be worshipped
after the other
prescribed cere-
monies have
been gone
through.

3. This must be done after the worship of *Varuna*, as appears from the text:—“The purified (chief judge) first shall perform the worship of *Varuna* with perfumes, garlands, *Soorabhi* (a sweet smelling substance), honey, milk, clarified butter, &c.†” This must be done after the invocation of *Dharma* and the other deities, and after the worship and burnt offerings shall have been performed, and the written charge placed on the head with the prescribed *formula* ; such being the general rule applicable to all ordeals.

Invocation to
be used by the
chief judge.

4. “Thou, O water, art the life of all creatures. Thou wast contrived at the beginning of the creation. Thou art celebrated as the purifier of all nature, animate and inanimate. Therefore do thou exhibit thy real essence for the discovery of good and evil‡.” After the chief judge shall have made the above invocation to the water, the person about to un-

And by the
accused.

* *Yājñyavalkya*, cited in the *Divyatatwa*, *Vivádatandava* ; but *Vyasa*, in the *Vyavaháramayñcha*.

† *Nārada*, cited in the *Divyatatwa*, *Vivádatandava*, and *Vyavaháramayñcha*.

‡ *Pitamaha*, cited in the *Divyatatwa* and *Vivádatandava*.

dergo the ordeal should thus invoke the water, " Preserve me, O *Varuna*, by declaring the truth*."

5. By *Nāreda* have been declared the places fit to be used for the ordeal by water :—" [The ordeal should be administered] in a river gently flowing [*Nadi*], the ocean [*Sagur*], a rivulet [*Vaha*], a pond [*Hrada*], a mountainous cavity [*Devakhata*], a pool [*Tadaga*], and a lake [*Sara*†]." *Pitamaha* also ordains :—" He (the accused) should dive into still water, but neither too deep nor too shallow. It should be devoid of weeds and aquatic plants, and free from leeches and fish. He may administer the ordeal by means of that water which is contained in mountainous cavities. He should always avoid a reservoir and a rapidly flowing river. He must always have recourse to such water as is free from waves and mud‡."

Enumeration of the different descriptions of water fit for the ordeal.

6. The term "*reservoir*" means water which has been brought from a pool, lake, or elsewhere, and emptied into a copper or other cistern.

Meaning of the term reservoir.

7. The person standing in water up to his navel, holding a *Dharma sth'hoona* or sacred pillar, made of a tree suitable for sacrifice, should remain there, with his face to the east quarter; as appears from the text, " Having held a sacred pillar, he should remain in the water with his face to the east quarter§."

The person who stands in the water, should hold a pillar.

* Vide *Supra*, § 1.

† *Divyatatwa, Vivādatandava*.

‡ *Vivādatandava*.

§ *Divyatatwa*.

Mode of as-
certaining in-
nocence.

8. What shall be done after this ? It is replied :—" A swift runner shall then hasten to fetch an arrow discharged at the moment, and if, while the runner is absent, he appears immersed, he should obtain acquittal*."

Explanation.

9. At the same time that the accused plunged into water, a strong person should discharge an arrow, and another swift runner proceeding to the spot where the arrow fell, having brought the arrow so discharged, if he, upon his return, see the person under the water, then he is entitled to acquittal.

Another
mode described.

10. It has been described also in the following manner. After three arrows shall have been discharged, a swift runner, having proceeded to the place where the second arrow has fallen, and having taken it up, should remain there, and another swift runner should remain at the place from whence the arrow was discharged under the *Torana* or signal post. After they have thus taken up a position, a third person should clap his hands, and the person who is about to undergo the ordeal should immediately dive under the water, at which instant the person standing under the signal post should run to the spot on which the second arrow fell, and, on his arrival, the person who took up the arrow, should hasten to the signal post, and if, on his return, he do not see the accused immersed under water, then he is condemned. This has been clearly declared by *Pitamaha*.

As declared
by *Pitamaha*.

11. " The running and diving, of the runner and the person who is about to undergo the ordeal, should be simultaneous. A swift runner should proceed from the foot of the

signal post to the target : afterwards the second one should quickly bring the arrow. He should go from the foot of the signal post, to the place where the first person went. If, on the return of him who took up the arrow, he do not see the accused out of the water, but entirely immersed under it, then his innocence must be admitted*.”

12. *Nāreda* has defined what constitutes a swift runner: —“ Among fifty runners two who can run most quickly, should be appointed to bring the arrow†.”

What constitutes a swift runner.

13. The signal post should be made to come up to the ear of the person who is about to undergo the ordeal, and fixed on an even ground in the vicinity of the place where he is about to undergo immersion. The text of *Nāreda* declares:—“ A signal post as high as the ear [of the accused] should be erected on level and purified ground, on the edge of the water in which he is to be immersed‡.”

Description of the signal post.

14. He [the chief judge] should first worship three arrows and a bow made of bamboo, with auspicious offerings, white flowers, &c. as *Pitamaha* has declared :—“ He [the chief judge] having first worshipped the arrows and the bow made of bamboo, with auspicious offerings, incense and flowers, should afterwards proceed to perform the rite, [that is, to administer the ordeal] §.”

Bow and arrows to be worshipped.

* *Divyatatwa.*

† *Divyatatwa* and *Vyavahāramayūc'ha.*

‡ *Divyatatwa.*

§ *Vyavahāramayūc'ha.*

Dimensions
of the bow, and
distance of the
target.

15. By *Nāreda* have been declared the dimensions of the bow and [distance] of the target. “Seven hundred fingers [in length] is a *kroora d'hanú* or dreadful bow; six hundred is a *madhyama* or moderate, and five hundred is a *munda* or inferior bow; know this to be the rule of the bow*. A skilful archer having made a target one hundred and fifty cubits distant, should discharge three arrows from a moderate bow, but not from any other. The archer is blameable if the arrows go beyond or fall short of the target†.” Or the term “seven hundred” may be construed seven fingers more than a hundred [as being the measure of] a *kroora d'hanú* or dreadful bow; so the terms six hundred and five hundred [may be construed similarly]. Thus the measure of a *kroora dhanú* or dreadful bow would be eleven fingers more than four cubits, of the *madhyama* or moderate bow ten fingers more, and of the *munda* or inferior bow nine fingers more.

Arrows how
to be made.

16. The arrows must be made of bamboo, but without an iron head, as appears from the text:—“An arrow without an iron point should be made for the purpose of the trial, and formed from the branch of a bamboo without knots, and the archer should discharge it with all his might‡.”

Who should
be the archer.

17. He should appoint as the archer, a person fasting, a *C'shetriya* or a *Brahmin* practised in the art, as appears from the text:—“It is declared that a *C'shetriya* is to be the

* *Divyatatwa*, *Vivadatandava*, and *Vyavahāramayūc'ha*.

† *Pitamaha*, cited in the *Divyatatwa*; but *Nāreda* in the *Vivadatandava* and *Vyavahāramayūc'ha*.

‡ *Catyāyana*, cited in the *Divyatatwa*, *Vivadatandava*, and *Vyavahāramayūc'ha*.

archer, or a *Brahmin* practised in that art; a mild, even-minded person, and one who has fasted shall discharge the

18. Of the three arrows discharged, the second one should be taken, conformably to the text:—"The law has declared that, of the discharged arrows, the arrow secondly discharged is to be taken by a strong person†." But it must be taken up from the spot on which it alighted, and not from the spot from which it glanced off. "The (place of the) falling of the arrow is to be understood, and (that) of its glancing off is not to be attended to. The glancing is the tortuous bounding of the arrow from distance to distance‡."

The arrow secondly discharged, should be brought from the spot on which it fell.

19. The arrows should not be discharged while the wind blows high, or on an uneven spot of ground, as appears from the text of *Pitamaha*. "A wise man shall not discharge an arrow while the wind blows high, nor on uneven ground, and places impeded by trees or posts, and covered with grass, shrubs, creepers, mud, or stones§."

Places and time improper for the discharge of arrows.

20. The text before cited; "If while the runner is absent, he appears immersed, he should obtain acquittal||," demonstrates the guilt of him who raises his body above the surface [before the arrow is brought back]. But *Pitamaha* has

If the person immersed move from the spot, he is considered guilty.

* *Pitamaha*, cited in the *Divyatatwa*, and *Vyavahāramayūc'ha*.

† *Divyatatwa*.

‡ *Ibid*.

§ *Divyatatwa*, *Vivādatandava*.

|| *Vide Supra*, § 8.

declared him guilty who moves from the spot:—"Under no circumstances should his innocence be admitted, if even a part of his person be visible, or if he move to another place from that into which he first plunged*."

His ears must
not be visible.

21. By the mention, "*if even a part of his person be visible*," the parts of his body from his ear downwards are intended, for there is particular mention [of that organ:] "During the time of his being under water, should his head only be seen, but not his ear and nose, in this case his innocence must be admitted†."

Recapitula-
tion of the
rules

22. The following is a recapitulation of the rules for the present ordeal. Having fixed the signal post as before described in the vicinity of a piece of water of the description mentioned; having made a target in a place at the distance specified; having worshipped the bow with the arrows in the vicinity of the signal post; having invoked *Varuna* to enter the water, and having worshipped him; having completed the worship, ending with burnt offerings, of *Dharma* and the other deities; and having bound the written charge on the head of the person who is about to undergo the ordeal, the chief judge should invoke the water with this *formula*, "Thou, O water, art the life of all creatures;" after this the person who is about to undergo the ordeal, having invoked the water with this *formula*, "Preserve me, O *Varuna*, by declaring the truth," should approach the per-

* *Náreda* and *Vrihaspati*, cited in the *Divyatatwa*; but *Pitamaha* in the *Vyavaháramayúc'ha*.

† *Divyatatwa*; but *Catyáyana*, cited in the *Vivádatandava* and *Vyavaháramayúc'ha*.

son standing up to his navel in water and leaning on a pillar; and after three arrows have been discharged, a swift runner going to the spot where the second arrow has alighted, shall take it up, and another one having been stationed at the foot of the signal post, the chief judge should clap his hands thrice, at which instant the running and diving should be simultaneous, and then the fetching the arrow.

SECTION 5.

Of the Ordeal by Poison.

1. He now propounds the rule of the ordeal by poison :— Form to be
observed in
this ordeal.
“Thou, O poison, art the son of *Brahma*, firm in the virtue of truth. Relieve me from this accusation, and by means of thy virtue become as nectar to me*.” “Having recited this formula, [the accused] should swallow *Saranga* or *Hemasailaja* poison, and if the poison digest, without violent symptoms, it indicates his innocence†.”

2. The accused, having invoked the poison with this formula, (Thou, O poison, &c. § 1.) shall swallow the poison produced on the Hemalaya mountains, or from the horn of an animal; and if he can digest it, without manifesting any violent symptoms from the poison, he is in that case absolved. By violent symptoms of poison is signified an entire change of the system from its natural state, as a text declares :—
“The entire change of the system from its natural state is a violent symptom of poison‡.” Explanation
of the text.

* *Yājñyavalkya*, cited in the *Veeramitrodaya* and *Divyatatwa*.

† *Ibid*.

‡ *Veeramitrodaya*.

Description
of poisonous
symptoms.

3. The corporeal system is composed of seven elements, as skin, blood, flesh, serum, bone, marrow, and semen; and the poisonous symptoms are also seven in number, the appearances of which are distinctly stated in the *Vishatantra*:—
“The first violent symptom of poison is horripilation; the second is perspiration and dryness of the mouth; the third and fourth cause the body to change its natural colour and trembling; the fifth prostration of strength, faltering of the voice, and hiccups; the sixth difficulty of respiration, and loss of reason; and the seventh produces the death of the patient*.”

Mahadeva to
be worshipped.

4. The worship of *Mahadeva* is in this case incumbent, as *Nāreda* says:—“Having worshipped *Maheswara* with incense, complimentary gifts, and *muntras*, he should, while fasting, administer the poison in the presence of the gods and *Brahmins*†.”

Invocation
to be used by
the chief judge.

5. The chief judge who has fasted, having worshipped *Mahadeva*, should place the poison before him (*Mahadeva*), and having completed the worship ending with the invocation of *Dharma* and other deities, and burnt offerings, and having placed the written charge on the head of the person who is about to undergo the ordeal, he should invoke the poison thus:—“Thou, O poison, wert produced by *Brahma* for the detection of the evil-minded. Display thy real quality towards sinners, but be as ambrosia to the innocent. Thou, O poison, image of death, wert made by *Brahma*, re-

* *Feeramitrodaya* and *Divyatatwa*.

† *Vivādatandava* and *Divyatatwa*.

lieve this man from sin and by means of thy virtue become as nectar to him*."

6. Having used this *formula*, the poison should be administered to him [the accused] in a sitting posture, and facing the north, as *Náreda* declares:—"The chief judge, his mind being composed, should, while facing either the north or east quarter, in the presence of *Brahmins*, administer the poison to [the accused] facing the north†."

The poison how to be administered.

7. The *Batscnabha* and the like poisons are fit to be administered, as a text of *Pitamaha* declares:—" *Sringi* or *Batsanabha* or *Himaja* poison [should be administered] ‡."

What are proper poisons.

8. The other sorts, which are not to be used, have also been propounded by him:—"He should reject poisons which are factitious, decayed, and vegetable§." *Náreda* also says:—"The *Bkrishta*, *Charita*, *Dhoopita*, *Misrita*, *Calcoota*, and *Alamboo* poisons, should be carefully avoided||."

And what improper.

9. The time of administering the poison is propounded by *Náreda*:—"Having weighed the poison, the quantity of it above indicated, must be administered at a cool season; but one acquainted with the law should not administer it either in the afternoon, or in the twilights, or at noon¶."

Proper time for administering it.

* *Pitamaha*, cited in the *Veeramitrodaya* and *Vivádatandava*.

† *Veeramitrodaya* and *Divyatatwa*.

‡ *Ibid*.

§ *Ibid*.

|| *Ibid*.

¶ *Veeramitrodaya*.

Quantity to be administered, varies according to the season.

10. A quantity less than that above stated, should be administered at another time, as a text declares :—" Four barleycorns of poison should be administered in the rainy season, five in the hot season, seven in the cold season, and less than that in the autumn*." "*Less than that*," means six (barleycorns).

Quantity to be administered in the proper season.

11. By the mention of the cold season, the dewy season is included, owing to their being included in the same compound term in the *Sruti*†. The spring is the time for all ordeals generally; and therefore, at that time also, seven barleycorns of poison mixed with clarified butter should be administered; as a text of *Nāreda* declares :—" One eighth minus an eighth of a twentieth of a sixth of a *pala* of the poison should be administered, mixed with clarified butter, to the person who is about to undergo the ordeal‡."

Measures by which the quantity is to be ascertained.

12. One *pala* is equal to four *sūvernas*; one sixth of a *pala* is ten *mashas* and ten barleycorns; three barleycorns make one *krishnala*; five *krishnalas* a *masha*; one *masha* is equal to fifteen barleycorns; ten *mashas* are equal to one hundred and fifty barleycorns; these with the addition of [ten barleycorns] are equal to one hundred and sixty barleycorns, which being one sixth of a *pala*, one twentieth of it [one sixth of a *pala*] is eight barleycorns; one eighth being subtracted from which makes one barleycorn less, which is equal to an eighth of a twentieth of a sixth of a *pala* [or seven barleycorns].—This quantity of poison

* *Veeramitrodaya* and *Divyatatwa*.

† *Divyatatwa*.

‡ *Veeramitrodaya*.

should be administered, mixed with clarified butter ; but the quantity of the clarified butter should be thirty times greater than the poison.

13. *Catyáyana* declares :—"In the morning and in a cool place, the poison being finely ground and mixed with clarified butter thirty times the quantity, should be given to all persons*." The meaning is, that the poison should be mixed with thirty times as much clarified butter.

Should be mixed with clarified butter.

14. The person about to undergo the ordeal must be guarded from sorcerers and such like persons. "The king should station his own people to guard the person who has undergone the ordeal, from the acts of sorcerers and the like, for the space of either three or five days and nights ; and should examine whether he keeps any medicine, *formula*, drugs, or gem, which may serve as antidotes to the poison, concealed about his person†." These are texts of *Pitamaha*.

Care should be taken against the admission of sorcery and antidotes.

15. The poison must also be tried :—"Poisons such as are produced from the horns of animals or from the Himalaya mountains, of superior quality, having smell, colour, and moisture of a known quality, and not removable by charms‡."

Requisite qualities of the poison.

16. After taking the poison a period of time should be observed, during which a man's hands may be clapped toge-

Time allowed for the poison to take effect.

* *Veeramitrodaya* and *Divyatatwa*.

† Ibid.

‡ *Náreda*, cited in the *Veeramitrodaya* and *Divyatatwa*.

ther five hundred times, after which, a remedy must be applied, as *Nāreda* declares:—"If he (the patient) during the time equal to the clapping of hands five hundred times, undergo no change of appearance, he is then absolved, and remedies must be applied*."

Period extended according to one authority.

17. *Pitamaha* extends the period to the end of the day, but this applies to a case where only a small quantity of poison is administered. "After taking the poison, if he be well, free from fainting and vomiting, and unchanged in appearance, then at the end of the day, his innocence must be admitted†."

Recapitulation.

18. Here, the chief judge, having fasted; having worshipped *Mahadeva*; having placed the poison in his presence; having adored *Dharma* and other deities; having placed the written charge on the head of the person who is about to undergo the ordeal, and invoked the poison, shall administer it to him facing the south; and the person who is about to undergo the ordeal, having invoked the poison, must take it. This is the order.—The above is the law of the ordeal by poison.

SECTION 6.

Of the Ordeal by sacred Libation.

Form to be observed in this ordeal.

1. He next propounds the ordeal by sacred libation:—"Having adored the wrathful gods, he should take the

* *Vecramitrodaya* and *Divyatatwa*.

† *Vecramitrodaya*.

water in which they have been bathed, and having invoked it, he should cause to drink three handfulls of the same water*."

2. " *Having adored*," having worshipped with perfumes, flowers, and the like; " *the wrathful gods*," *Doorga*, *Aditya*, and other deities: having washed them, the water in which they have been bathed should be collected. After bringing [the water], the chief judge should thus address it, "Thou, O water, art the life of all mortals†;" and should cause the person who is about to undergo the ordeal, to drink three handfulls of it; he having placed the water in another vessel, and invoking it thus, "O *Varuna*, by means of thy truth, preserve me‡."

Explanation of the text.

3. This is to be done after the ceremonies prescribed for all ordeals, such as the invocation of *Dharma* and other deities, worship, and burnt offerings, and the placing of the written charge on the head with the prescribed formula.

Ceremonies prescribed for other ordeals, to be observed in this.

4. Here, by *Pitamaha* and others, have been propounded the rules relative to the deities proper for bathing, the fit occasions, and the persons who are competent to perform the rites:—"He should cause him to drink the water of that deity to whom he may be particularly devoted, and in case the individual worships all the deities equally, he must drink the water in which *Surya* or the sun has been bathed.

The worship of particular deities, prescribed for certain individuals.

* *Yājñyavalkya*, cited in the *Smṛitichandricā*, and *Veeraṃitrodaya* but *Viṣṇu* in the *Vivādatandava*.

† Vide *Supra*.

‡ Ibid.

Thieves and persons who live by the profession of arms should be made to drink the water in which *Doorga* has been bathed, but in no case should a *Brahmin* be made to drink [the water] in which *B'hascara* or the sun has been bathed. The spear of *Doorga* and the disc (*Mandala*) of *Aditya* or the sun must be washed; so the weapons of the other deities*.”—This is the rule with respect to the deities.

Cases in which, and persons by whom, this ordeal should be used.

5. “The sacred libation must always be given in a case of confidence, and in cases of suspicion in general, and also for the purpose of reconciliation in order to produce mental satisfaction. The sacred libation is ordained to be used in the morning, by a person fasting, having bathed, clothed in moist garments, by a religious person, and one not addicted to evil practices†.” “A religious person” signifies, one who believes in the existence of the Supreme Being.

Persons to whom this ordeal should not be administered.

6. “No wise man should administer the sacred libation to a drunkard, or a fornicator, to one addicted to evil practices, to a fraudulent person, and one professing atheism. He should avoid giving the sacred libation to a heinous offender, to one irreligious, ungrateful, to one impotent, lowborn, or atheistical, to one of whom the customary sacraments have been omitted, and who has not received investiture with the sacred thread, and to slaves‡.”

Explanation of the disqualifying terms.

7. “A heinous offender,” [one who has committed] a crime of the first degree; “irreligious,” destitute of the re-

* *Smritichandrica*, *Vivádatandava*, *Vecramitrodaya*, and *Divyatatwa*.

† Cited by *Ballambhatta*.

‡ *Nāreda*, cited in the *Divyatatwa*.

ligion of his class or order, and a heretic ; “ *lowborn*,” born in the reverse order of the tribes ; “ *slaves*” includes fishermen or the like.—This is the rule relative to persons incompetent.

8. And it must be understood by the text of *Nāreda*, that [the chief judge], having made a circle with cow-dung, and placed the person who is about to undergo the ordeal, facing the east, within that circle, should administer to him the sacred libation. His text is to the following effect :—
“ Having brought the accused, he should place him inside the circle, and administer to him three handfulls of water, facing the east*.”

Duty of the chief judge.

9. But [should it be objected], that admitting the establishment of guilt and innocence at the completion of the other ordeals, beginning with the balance and ending with the poison, such effect cannot result from the ordeal by sacred libation ; it is replied :—“ He is doubtless innocent to whom no terrible calamity, proceeding from the act of God or the king, happens within fourteen days†.” He to whom, prior to the expiration of fourteen days, no calamity or terrible distress proceeding from the king or the act of God, that is, having superhuman origin, happens or befalls, and he to whom only a slight distress occurs, should be considered as innocent ; for cases of slight distress are incident to all mortals.

The innocence of the accused is proved, if no calamity befall him within fourteen days.

10. Guilt is not imputable if the calamity occur after the prescribed period, as *Nāreda* says :—“ One to whom any

Calamity happening after that period is no evidence of guilt.

* *Nāreda*, cited in the *Vivādatandava* and *Divyatatwa*.

† *Yājñawalkya*, cited in the *Vivādatandava*.

great deterioration happens at the end of two weeks, the wise should not consider as convicted; owing to the expiration of the prescribed period*."

In trifling cases the period allowed is less.

11. The text "*within fourteen days*," applies to weighty charges, as has been specifically declared in the text:—"These must be administered in cases of weighty charges†." Other periods are propounded by *Pitamaha* in trifling cases:—"In a trifling case, the sacred libation is to be administered." The periods are these:—"Of whomsoever any deterioration appears, during either three or seven nights, or twelve days or two weeks, he must be held to be a criminal‡."

And varies as the charge is more or less trifling.

12. The subject matter which does not constitute a heavy charge, may be divided into three kinds, and the rule regarding the three periods, [namely three nights, seven nights, and twelve days,] may be applied to each kind of case severally.—Thus (has been declared) the law of the ordeal by sacred libation.

SECTION 7.

Of the Ordeal by Grains of Rice.

1. *Jogeswara* has propounded the five great ordeals, from the balance to the sacred libation inclusive, as indicated; but other ordeals in trifling charges have been declared

* *Vivādatandava*, *Veeramitrodaya*, and *Divyatatwa*.

† *Divyatatwa*.

‡ *Smritichandricā*, *Vivādatandava*, and *Veeramitrodaya*; but *Yājñyavalkya* cited in the *Divyatatwa*.

ed in other *Smritis*; *Pitamaha* has declared:—"I will propound the mode of using the ordeal by husked rice as ordained. In the case of theft the [ordeal of] husked rice is to be administered, and not in other cases; this is certain.

Should be administered in cases of theft.

2. He should cause white rice to be used, and of the *Shalee** description, but not of any other kind. A purified person having mixed the same with water, in which [an image of the sun] has been bathed, in an earthen vessel exposed to the rays of the sun, should leave it on the same spot all the night.

Ceremonies to be observed on the occasion.

He [the chief judge] must cause the person, standing with his face to the east, having fasted and bathed, and taken the written charge on his head, to chew the rice and to spit it out on a leaf. The leaf must be of the fig-tree†, and not of any other; but if none be procurable, of the *Bhoorjapatra*‡.

3. If the chewed rice be tinged with blood, and the jaws and palate [of the accused] become dry, and his body tremble, consider him guilty§. Let the chief judge, having caused the person who has taken the written charge on his head, to chew the rice and to spit it out. Having caused to chew [*bhukéshyitwa*] is the active participle formed by the causal affix *nichi*. In this instance, the invocation of *Dharma* and the ceremonies are to be observed, in the manner already prescribed; such being the general rule applicable to all ordeals.

Proof of guilt.

All the ceremonies prescribed for other ordeals to be observed in this.

* *Shalee*.—Rice in general, but especially in two classes, one like white rice growing in deep water, and the other a red sort requiring only a moist soil.—Wilson's Dict.

† *Pippala*, *Ficus religiosa*.

‡ The *Bhoj* or *Bhojputr*, a tree growing in the snowy mountains, and called by travellers a kind of birch.—Wilson's Dict.

§ *Smritichandricá*, *Vivádatandava*, *Veeramitrodaya*, and *Divyatutwa*.

SECTION 8.

Of the Ordeal by hot Metal.

Form to be
observed in this
ordeal.

1. The ordeal by hot metal has been propounded by *Pitamaha*. "A round cup of either gold, silver, copper, or earth, is to be made, sixteen fingers [in circumference] and four in depth*. The term "round cup" (*mandala*) here means a circular pan. "It is to be filled up with twenty *palas* of clarified butter and oil; and one *masha* of gold is to be thrown in when it is heated sufficiently; and he [the accused] should take out the gold by the thumb and forefinger joined.

Proof of in-
nocence.

He whose hand trembles not, and does not become blistered, and whose fingers sustain no detriment, becomes absolved by means of his virtue†."

Explanation.

2. In the text, the term "should take out" means, should lift out of the vessel only, and it is not necessary to be thrown over the side.

Another
mode of per-
forming this or-
deal.

3. Another mode is:—"Having put clarified butter, made of cow's milk, into a vessel formed either of gold, silver, copper, iron, or earth, a purified person should heat it in the fire. A piece of metal, either gold, silver, copper, or iron, properly cleaned and washed once with it, is to be thrown in it [the clarified butter], boiling with effervescence, and not admitting the touch of the nail. It [the clarified butter] should be examined by throwing into it the leaf of the

* The text is read otherwise by the authors of the *Smritichandricā*, *Vivādatandava*, *Veeramitrodaya*, and *Divyatatwa*.

† Ibid.

*Arca** tree, being purified as for sacrifice, and having a hissing sound; afterwards he should once consecrate it with this *Muntra* or *formula*:—‘Thou, O clarified butter, art most pure for sacrificial observances. Thou, O fire, certainly burnest sinners, and waxest cold in favour of the innocent.’ He should cause him [the accused], having come fasting, bathed, and with moist clothes, to take out the metal, which was left in the clarified butter. The examiners should inspect his forefinger; and if there be no blisters on it, he is innocent, but if otherwise, guilty†.”

4. Here also the rule regarding the invocation of *Dharma*, and the like ceremonies, must be attended to. The above incantation to the clarified butter is to be used by the chief judge.

All the ceremonies used in other ordeals to be observed in this.

5. “Thou, O purifying fire, dwellest in the interior of all creatures‡.” This *formula* is to be used by the person about to undergo the ordeal.

Formula to be used by the party.

6. From the text “should inspect the forefinger” it follows. that it is that finger by which the metal should be taken out.—Thus has been succinctly propounded the ordeal by hot metal.

Explanation of a former text.

* *Arca* is commonly called *Acanda* : *Calotropis gigantea*.

‡ *Smritichandricā*, *Veeranitrodaya*, and *Divyatatva*.

† *Vide Supra*.

SECTION 9.

Of the Ordeal by Dharma and Adharma.

This ordeal
applicable to
what cases.

1. By *Pitamaha* has been declared the rule regarding the ordeal named *Dharma* and *Adharma**:—"I will now clearly propound the trial by *Dharma* and *Adharma*, [which is intended for] murderers, civil suitors, and persons subject to the performance of penance†."

Explanation
of the text.

2. "*Murderers*", in cases involving life; "*civil suitors*", in cases involving property; "*persons subject to the performance of penance*," in cases involving moral sin.

Form to be
observed in this
ordeal.

3. "An image of *Dharma* is to be made with silver and another of *Adharma* with lead or iron‡." The meaning is, that this image may be made either of lead or iron.

Another
mode of per-
forming this or-
deal.

4. He declares another mode:—"Or he may draw white and black figures of *Dharma* and *Adharma*, either on a leaf of the *Bhoj* tree, or on canvas, cloth, &c. He should sprinkle the *Panchagavya*§ on them, and should make offerings of perfumes and garlands. *Dharma* will hold a white flower in his hand, and *Adharma* a black one. Having made two pictures as above described, he should enclose them in two round balls. Two balls equal in size are to be made either

* These terms may be translated the genius of justice and of injustice.

† *Smritichandricā*, *Veeramitrodya*, and *Dvayatatra*.

‡ *Pitamaha*, cited in the *Smritichandrica*, *Veeramitrodya*, and *Dvayatatra*.

§ This is used for purification, and made with sugar, clarified butter, honey, cow-dung, and cow-urine.

with cow-dung or earth, and placed unobserved in a fresh earthen vessel. Having placed the vessel on a spot cleaned and rubbed with cow-dung, and in the presence of the gods and *Brahmins*; he should invoke the gods and regents of the world in the manner above prescribed*."

5. He should draw out the written charge after the invocation of *Dharma*: then the accused should recite this formula:—"If I am free from guilt, may *Dharma* come into my hand; if I am guilty, then by means of its virtue, may Sin† come into my hand‡."

Formula to be recited by the accused.

6. "The accused without delay shall then take out one of the images; he is acquitted if he bring out the image of *Dharma*; but condemned if he draw forth that of *Adharma*§."—Thus has been succinctly declared the trial by *Dharma* and *Adharma*.

Proof of guilt or innocence.

SECTION 10.

Of other Tests.

1. Moreover, other tests with reference to the importance and lightness of the subject matter, as well as to the distinction of the tribes, have been declared by *Menu* and others. Those are:—"The oath should be taken, by truth in the case of one *Niska*: by touching the feet [of a superior] in that

Enumeration of other tests for the ascertainment of guilt or innocence.

* *Pitamaha*, cited in the *Smṛitichandricā*, *Veeraṃitrodaya*, and *Divyatatva*.

† *Sin* here means the image of *Adharma*.

‡ *Pitamaha*, cited in the *Smṛitichandricā*, *Veeraṃitrodaya*, and *Divyatatva*.

§ *Ibid*.

of two *Niskas*, and by [the forfeiture of the fruit of] virtuous acts in the case of three, and by the sacred libation in cases exceeding that amount*." "Let the judge cause a priest to swear by his veracity; a soldier, by his horse or elephant, and his weapons; a merchant by his kine, grain, and gold; a mechanic or servile man, *by imprecating on his own head, if he speak falsely*, all possible crimes†."

Mode of ascertaining innocence.

2. The mode of ascertaining innocence is propounded by *Menu*:—"One who meets with no speedy misfortune, must be held veracious in his testimony on oath‡." The calamity is thus described. "Of whom no dreadful calamity befalls from God or the king§."

Time to be allowed.

3. The extent of the period [allowed for the appearance of the calamity], varies from the first night to the third, from the third night to the fifth, and so forth, and should be fixed with reference to the serious or trifling nature of the charge

Losing party to be subjected to fine and penalty.

4. The result, whether successful or otherwise, of these ordeals, being determined, a distinction as to the punishment is shown by *Catyāyana*:—"He should cause to be paid [by the losing] to the successful party half of an hundred, and the condemned is subject to a penalty || "

* *Vivadatandava*.

† *Menu* 8, § 113. cited in the *Vivadatandava*, *Veeramitrodaya*, and *Diryatutwa*.

‡ *Vivadatandava*, *Veeramitrodaya*, *Menu*, 8. § 115.

§ *Vide Supra*.

|| *Vivadatandava*.

5. The penalty is thus propounded :—" The penalty in the ordeal by poison, water, fire, balance, sacred libation, rice, hot metal, should be awarded consecutively; thus one thousand, six hundred, five hundred, four, three, two, and one hundred. and in inferior ordeals he should attach an inferior [penalty.]"

Amount of
fine,

6. This peculiar penalty for cases of ordeal is to be superadded to the penalty before denounced by the text, (" In the case of a denial, when the claimant proves his allegation, the defendant being cast, is to pay the amount, and an equal fine to the king†.")

Is to be superadded to the
penalty formerly denounced.

* *Catyañyana*, cited in the *Vivádutandava*.

† Vide *Supra*, Cap. ii. Sect. 3. § 1.

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E R R A T A.

- Preface, page xxii, line 4, for "*Chintāmaṇi*," read "*Chūdāmāṇi*."
- Page 70, bottom note, l. 12, for "*Kishermunee*," read "*Kishenmunee*."
- „ 98, bottom note, l. 2, for "*Balambhatta*," read "*Culluca-*
bhatta."
- „ 111, marginal note, l. 5, for "fro," read "for."
- „ 127, l. 6, for "recei-" read "receiv-"
- „ 128, l. 1, for "Hnidu," read "Hindu."
- „ 178, bottom note, l. 1, for "and by *Dipacalica*," read "and *Di-*
pacalica, and by."
- „ 184, bottom note, l. 1, for " *Vishvarūpa*," read "and by *Visva-*
rūpa."
- „ 197, l. 9, for "test," read "text."
- „ „ first marginal note, l. 4, dele "divine."
- „ 217, last line, for "concretec er," read "concrete cer."
- „ 266, first marginal note, for "obligation," read "objection."
- „ 306, l. 15, for "ordea," read "ordeal."
- „ 322, third marginal note, for "ode," read "mode."
- „ 331, second marginal note, for "shoul," read "should."
- „ 337, l. 1, dele "ed."

